(34)

No. 99-1240-CFX Title: Board of Trustees of the University of Alabama, et al., Petitioners
v.
Patricia Garrett, et al.

Docketed:
January 26, 2000 Court: United States Court of Appeals for the Eleventh Circuit

Entry	Date	Proceedings and Orders
	Jan 24 2000	Petition for writ of certiorari filed. (Response due March 27, 2000)
	Feb 3 2000	Order extending time to file response to petition until March 15, 2000.
	Feb 17 2000	Order further extending time to file response to petition until March 27, 2000.
	Feb 17 2000	This extension is granted for all respondents.
	Feb 23 2000	Motion of of the parties to expedite consideration of the petition for a writ of certiorari filed.
	Feb 29 2000	Amended motion of the parties for expedited consideration filed.
	Mar 1 2000	Motion of of the parties to expedite consideration of the petition for a writ of certiorari DENIED.
	Mar 17 2000	Brief of respondent United States filed.
	Mar 17 2000	Memorandum of respondents Patricia Garrett and Milton Ash filed.
	Mar 22 2000	DISTRIBUTED for Conference of April 14, 2000
	Mar 27 2000	Reply brief of petitioners University of Alabama Board of Trustees, et al. filed.
	Apr 5 2000	Letter from the Solicitor General received.
	Apr 17 2000	Petition GRANTED. limited to Question 1 presented by the petition. SET FOR ARGUMENT October 11, 2000. **********
	May 10 2000	Order extending time to file the joint appendix and petitioners brief on the merits to and including June 22, 2000.
	May 24 2000	Order extending time to file respondents' brief on the merits to and including August 11, 2000.
	Jun 22 2000	Joint appendix filed.
	Jun 22 2000	Brief of petitioners University of Alabama at Birmingham filed.
	Jun 22 2000	Brief amici curiae of Hawaii, et al. filed.
	Jun 22 2000	Brief amicus curiae of Association of State Correctional Administrators filed.
	Jun 22 2000	Brief amicus curiae of Coalition for Local Sovereignty filed.
	Jun 22 2000	Brief amicus curiae of Pacific Legal Foundation filed.
	Jun 22 2000	Brief amicus curiae of Criminal Justice Legal Foundation filed.
	Jul 25 2000	Record filed.
	Aug 7 2000	Record filed.
	Aug 10 2000	Brief amici curiae of Law Professors William Banks, et al. filed.
	Aug 11 2000	Brief of respondents Patricia Garrett and Milton Ash filed.

app

No. 99-1240-CFX

Entry	Date	Proceedings and Orders
	Aug 11 2000	LODGING consisting of twenty sets of three documents submitted by counsel for Garrett and Ash.
	Aug 11 2000	Brief of respondent United States filed.
	Aug 11 2000	Brief amicus curiae of American Bar Association filed.
	Aug 11 2000	Brief amici curiae of Alabama, et al. filed.
	Aug 11 2000	Brief amici curiae of Robert Dole, et al. filed.
	Aug 11 2000	Brief amici curiae of Voice of the Retarded, et al. filed.
	Aug 11 2000	Brief amicus curiae of American Cancer Society filed.
	Aug 11 2000	Brief amici curiae of Lambda Legal Defense & Education, et al. filed.
	Aug 11 2000	Brief amici curiae of National Assn. of Protection and Advocacy Systems, et al. filed.
	Aug 11 2000	Brief amici curiae of Self-Advocates Becoming Empowered, et al. filed.
	Aug 11 2000	Brief amici curiae of American Assn. on Mental Retardation, et al. filed.
	Aug 11 2000	Brief amici curiae of American Association of People With Disabilities, et al. filed.
	Aug 11 2000	Brief amicus curiae of George H.W. Bush filed.
	Aug 11 2000	Brief amici curiae of National Employment Lawyers Assocciation, et al. filed.
	Aug 11 2000	Brief amici curiae of Minnesota, et al. filed.
	Aug 11 2000	Brief amici curiae of Paralyzed Veterans of America, et al. filed.
	Aug 11 2000	Brief amicus curiae of National Council on Disability filed.
	Aug 11 2000	Brief amici curiae of Morton Horowitz, et al. filed.
	Aug 11 2000	Appendix of amici curiae Morton Horowitz, et al. filed.
	Aug 14 2000	Motion of the Solicitor General for divided argument filed.
	Aug 14 2000	CIRCULATED.
	Aug 15 2000	LODGING consisting of twenty copies of appendix material submitted by counsel for amici Self-Advocates.
	Sep 13 2000	Reply brief of petitioners Board of Trustees of the University of Alabama, et al. filed.
	Sep 25 2000	Motion of the Solicitor General for divided argument distributed.
	Sep 26 2000	Motion of the Solicitor General for divided argument GRANTED.
	Oct 2 2000	LODGING consisting of twenty copies of revised law journal article previously submitted by counsel for the respondents received and distributed.
	Oct 11 2000	ARGUED.

Supreme Court, U.S.
FILED

991240 JAN 24 2000

No. _____
OFFICE OF THE CLERK

In The

Supreme Court of the United States

THE UNIVERSITY OF ALABAMA AT BIRMINGHAM, BOARD OF TRUSTEES, AND THE ALABAMA DEPARTMENT OF YOUTH SERVICES,

Petitioners,

v.

PATRICIA GARRETT AND MILTON ASH,

Respondents.

On Petition For A Writ Of Certiorari To The United States District Court, N.D. Alabama, Southern Division

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Eleventh Amendment to the United States Constitution bars suits by private citizens in federal court under the Americans with Disabilities Act against non-consenting states.

II. Whether the Eleventh Amendment bars suits in federal court by private citizens under Section 504 of the Rehabilitation Act of 1973 against non-consenting states.

PARTIES TO THE PROCEEDING BELOW

The plaintiffs in the United States Court of Appeals for the Eleventh Circuit were Patricia Garrett and Milton Ash, who brought claims under the Americans With Disabilities Act and Section 504 of the Rehabilitation Act of 1973. Patricia Garrett also brought a claim under the Family and Medical Leave Act. The defendants in the United States Court of Appeals for the Eleventh Circuit were The Board of Trustees for the University of Alabama in Birmingham and the Alabama Department of Youth Services. The United States of America intervened at the Court of Appeals to defend Section 504 of the Rehabilitation Act, the Americans with Disabilities Act and the Family and Medical Leave Act.

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PETITION FOR A WRIT OF CERTIORARI

The State of Alabama and two of its agencies, the Alabama Department of Youth Services and the University of Alabama at Birmingham, Board of Trustees (collectively, the "State"), petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit, denying their assertion of Eleventh Amendment immunity in the face of private actions against the State brought pursuant to the Americans with Disabilities Act and the Rehabilitation Act of 1973. Alternatively, the State requests that the Court hold this Petition pending this Court's decision in *Dickson v. Florida Dept. of Corrections*, 139 F.3d 1426 (11th Cir. 1998), *cert. granted*, 67 U.S.L.W. 3397 (Jan. 21, 2000). At that time the Court should grant certiorari and either reverse the decision below or vacate that decision and remand this case for reconsideration in the light of *Dickson*.

OPINIONS BELOW

The Eleventh Circuit's decision (Pet. App. 1) is published at 193 F.3d 1214, and the district court's decision (Pet. App. 49) is published at 989 F. Supp. 1409.

JURISDICTION

The Eleventh Circuit's decision was entered on October 26, 1999. The State invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Fourteenth Amendment provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> (Sections 2, 3, and 4 omitted)
>
> * * *
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The Americans with Disabilities Act Abrogation Clause provides:

> 42 U.S.C.A. § 12202. A State shall not be immune under the Eleventh Amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this Chapter, remedies (including both remedies at

> law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

The Rehabilitation Act of 1973 Abrogation Clause provides:

> 42 U.S.C.A. § 2000d-7. (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C.A. § 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.
>
> (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

STATEMENT OF THE CASE

The State of Alabama submits this petition to obtain review of a decision by the Eleventh Circuit holding that Congress possessed the power to abrogate the states' immunity from private suits under the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (Rehab Act). The court stated that it was bound

by the earlier Eleventh Circuit decision in *Kimel v. Florida Board of Regents*, 139 F.3d 1426 (11th Cir. 1998), *rev'd in part*, ___ U.S. ___ (Jan. 10, 2000), which held that Congress lacked the power to abrogate the states' Eleventh Amendment immunity under the Age Discrimination in Employment Act (ADEA), but had the power to abrogate the states' immunity under the ADA. In *Kimel v. Florida Board of Regents*, ___ U.S. ___ (Jan. 11, 2000), this Court upheld the ADEA portion of the Eleventh Circuit's *Kimel* decision. On January 21, 2000, this Court granted certiorari in *Florida Dep't of Corrections v. Dickson*, No. 98-829 (U.S.), to review the ADA portion of the Eleventh Circuit's *Kimel* decision. In the light of that very recent development, we believe this petition for a writ of certiorari should be held pending this Court's decision in *Dickson*. At that time, the Court should grant certiorari and either reverse the decision below or vacate that decision and remand this case for reconsideration in the light of *Dickson*.

This case commenced in 1997, when Plaintiffs/Respondents Patricia Garrett and Milton Ash filed separate suits in the United States District Court for the Northern District of Alabama. Both claimed discrimination by the State on the basis of disability, in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, and § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Ash, a correctional officer with the State's Department of Youth Services, asserted inadequate accommodations were provided to him under the ADA and Rehab Act for his asthma and sleep apnea. Garrett, the Director of Nursing for Women's Services at the University of Alabama Hospital, claimed discrimination under the ADA on the basis of being regarded as disabled, due to

her history of cancer. Garrett also claimed violations of the Family and Medical Leave Act ("FMLA").

On January 13, 1998, in a single opinion, the district court granted the State's motions to dismiss both plaintiffs' claims, holding that the claims were barred by the Eleventh Amendment. The plaintiffs, represented by the same counsel, filed notices of appeal on January 20, 1998. The cases were consolidated on appeal and the United States intervened and argued that the State was properly subject to suit under the challenged statutes. On October 26, 1999, after hearing oral arguments from all parties, a panel of the Eleventh Circuit Court of Appeals rendered a decision reversing the judgments of the district court in favor of the defendants on the ADA and Rehab Act claims, but affirming the judgment as to dismissal of the FMLA claim. In its opinion, the panel held that it was bound by another Eleventh Circuit panel's decision upholding Congress's abrogation of Eleventh Amendment immunity under the ADA. 193 F.3d 1214, 1218 (11th Cir. 1999) (citing *Kimel v. Florida Board of Regents*, 139 F.3d 1426 (11th Cir. 1998)). This Court affirmed the Eleventh Circuit's decision in *Kimel* with respect to the ADEA on January 11, 2000, *Kimel v. Florida Board of Regents*, ___ U.S. ___, 2000 U.S. LEXIS 498, 2000 WL 14012 (Jan. 11, 2000), and has granted certiorari with respect to the ADA. *Florida Dep't of Corrections v. Dickson*, No. 98-829 (U.S.), *cert. granted* (Jan. 21, 2000).

REASONS FOR GRANTING THE WRIT

I. EIGHT CIRCUITS ARE IN DIRECT CONFLICT AS TO WHETHER THE ELEVENTH AMENDMENT BARS PRIVATE SUITS IN FEDERAL COURT UNDER THE AMERICANS WITH DISABILITIES ACT AGAINST NON-CONSENTING STATES.

A direct conflict of authority exists among the circuit courts of appeal as to whether Congress has the power to abrogate the states' Eleventh Amendment immunity from private suits under the ADA. At present, eight circuits have issued direct holdings and extensive opinions on the Eleventh Amendment-ADA issue. Of those eight circuits, six, including the court below, upheld Congress's power to abrogate the states' immunity, and two held the Eleventh Amendment bars private suits against states under the ADA. Even under the most stringent application of the lower-court conflict considerations of Rule 10, this issue warrants review now, rather than later.

States are now subject to private suit under the ADA in the Second, Fifth, Seventh, Ninth, Tenth and Eleventh Circuits.[1] *See* Pet. App. 1-2; *Muller v. Costello*, 187 F.3d 298 (2nd Cir. 1999); *Coolbaugh v. Louisiana*, 136 F.3d 430 (5th Cir. 1998); *Crawford v. Indiana Dep't of Corrections*, 115 F.3d 481 (7th Cir. 1997); *Clark v. California*, 123 F.3d 1267 (9th Cir. 1997); *Martin v. Kansas*, 190 F.3d 1120 (10th Cir. 1999); *Garrett v. Univ. of Alabama at Birmingham Bd. of Trustees*,

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[1] In addition, a panel of the First Circuit Court of Appeals has stated in *dicta* that if the issue were properly before them, they would rule that Congress had abrogated the States' Eleventh Amendment immunity by enacting the ADA. *Torres v. Puerto Rico Tourism Co.*, 175 F.3d 1, 6 n. 7 (1st Cir. 1999).

193 F.3d 1214 (11th Cir. 1999). Those circuits reasoned that Congress had acted congruently, proportionally, and within the limits of Section 5 of the Fourteenth Amendment in abrogating Eleventh Amendment immunity.

On the other side of this conflict stand the decisions of the Fourth Circuit in *Brown v. North Carolina Div. of Motor Vehicles*, 166 F.3d 698 (4th Cir. 1999) and the *en banc* Eighth Circuit's holding in *Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999). Both circuit courts concluded, under the second prong of the *Seminole Tribe* test and the decision of this Court in *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157 (1997), that Congress, in passing the ADA, had exceeded its power under Section 5 of the Fourteenth Amendment. The circuit courts relied upon this Court's holding in *Boerne* and concluded that the ADA is substantive legislation that attempts to redefine the scope of the Fourteenth Amendment, rather than remedial legislation. *Alsbrook*, 184 F.3d at 1007-10; *Brown*, 166 F.3d at 704-8. Both circuit courts determined that the ADA is not remedial because it is neither proportional nor congruent, in that it targets all state action, affording unwarranted protections to a non-suspect or non-quasi-suspect group. In so holding, the Fourth Circuit and the Eighth Circuit considered this Court's decision in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S. Ct. 3249 (1985), which held that the mentally handicapped are not a suspect or quasi-suspect class.

In stark contrast to the holdings in *Brown* and *Alsbrook*, the Second, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuit Courts concluded that the ADA is neither substantive nor definitional, but, in fact, remedial.

Muller, 187 F.3d at 307; *Coolbaugh*, 136 F.3d at 434; *Crawford*, 115 F.3d at 486; *Clark*, 123 F.3d at 1270; *Martin*, 190 F.3d at 1127; *Garrett*, 193 F.3d at 1218. Those circuit courts reached their conclusion by giving weight and deference to Congress's fact finding. Conversely, the Fourth Circuit and Eighth Circuit did not believe that Congress's findings of fact justified the overreaching, substantive nature of the ADA. *Alsbrook*, 184 F.3d 999 at 1007 (recognizing the extent to which other circuits have relied on the existence of congressional findings in deciding the Eleventh Amendment-ADA issue).

The decision of the Eleventh Circuit Court of Appeals below, that the Eleventh Amendment bars private suits against the states under the ADA, is in conflict with the holdings of the Fourth Circuit and the Eighth Circuit. Further, the conflict encompasses eight separate circuit courts of appeals that have squarely addressed the issue. For these reasons, and those set forth below, this Court should hold this Petition pending a decision in *Dickson*. At that time, the Court should grant certiorari and either reverse the decision below or vacate that decision and remand this case for reconsideration in the light of *Dickson*.

II. FOUR CIRCUITS ARE IN DIRECT CONFLICT AS TO WHETHER THE ELEVENTH AMENDMENT BARS PRIVATE SUITS AGAINST STATES IN FEDERAL COURT UNDER SECTION 504 OF THE REHABILITATION ACT.

At present, four circuits have addressed the application of Eleventh Amendment immunity to private suits against non-consenting states under Section 504 of the

Rehabilitation Act. Today, non-consenting states may be sued by private citizens under § 504 of the Rehab Act according to the Fifth, Ninth, and Eleventh Circuit Courts of Appeals. *Coolbaugh v. Louisiana*, 136 F.3d 430 (5th Cir. 1998); *Clark v. State of California*, 123 F.3d 1267 (9th Cir. 1997); *Garrett v. Univ. of Alabama at Birmingham Board of Trustees*, 193 F.3d 1214 (11th Cir. 1999). All three circuits determined that Congress, in abrogating Eleventh Amendment immunity under Section 504 of the Rehabilitation Act, acted congruently, proportionally, and within the limits of Section 5 of the Fourteenth Amendment.

Conversely, the Eighth Circuit held that Congress's attempt to abrogate the states' Eleventh Amendment immunity, under the express abrogation provision of the Rehab Act, failed. *Bradley v. Arkansas Dept. of Education*, 189 F.3d 745 (8th Cir. 1999).[2] The Eighth Circuit held that the Rehabilitation Act's abrogation provision was not effective as a proper exercise of Congress's Fourteenth Amendment enforcement clause powers. *Bradley*, 189 F.3d at 756. In doing so, the Eighth Circuit adopted its own reasoning in *Alsbrook*, concluding that Section 504 of the Rehabilitation Act is not remedial. *Bradley*, 189 F.3d at 756.

Accordingly, there is a direct conflict among the circuit courts of appeals as to whether the Eleventh Amendment bars private actions against non-consenting states under the Rehab Act. For these reasons, and those set forth below, this Court should hold this Petition pending

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[2] On December 14, 1999, the Eighth Circuit Court of Appeals granted rehearing as to the spending clause portion of opinion. *See Jim C. v. Arkansas Dept. of Education*, 197 F.3d 958 (8th Cir. 1999).

a decision in *Dickson*. At that time, the Court should grant certiorari and either reverse the decision below or vacate that decision and remand this case for reconsideration in the light of *Dickson*.

III. THE DECISION OF THE ELEVENTH CIRCUIT IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT.

The Eleventh Circuit found that Congress had effectively abrogated the State's Eleventh Amendment immunity under the ADA, pursuant to its Fourteenth Amendment enforcement powers. That decision, however, was reached without the benefit of this Court's extensive equal protection analysis in *Kimel v. Florida Board of Regents*, ___ U.S. ___ (Jan. 11, 2000). *Kimel* and other decisions of this Court seriously undermine both the reasoning and result of the Eleventh Circuit's decision in this case.

A. Alleged Discrimination against the Disabled Receives Rational Basis Review.

In *Kimel*, this Court affirmed an Eleventh Amendment challenge to the ADEA using a rational basis analysis, because the class of persons covered by the ADEA is not a suspect class. The ADA and Rehab Act likewise cover a class of individuals that are subject to a rational basis analysis. Disability is not a suspect class under the Equal Protection Clause. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S. Ct. 3249 (1985), (mentally retarded persons, a subset of the disabled class, are neither a suspect nor a quasi-suspect class). After *Kimel* and this Court's decision in *Florida Prepaid Postsecondary*

Expense Board v. College Savings Bank, 527 U.S. ___, 119 S. Ct. 2199, 144 L. Ed. 2d 575 (1999), it is clear that states may make employment decisions based on disability, as long as they have some rational basis for doing so. Even if the states are wrong about their reasons, their decisions could pass the rational basis test under the Equal Protection Clause. Non-suspect classifications, such as age, or in this case, disability, "unlike governmental conduct based on race or gender, cannot be characterized as 'so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy.' " *Kimel*, 2000 WL 14165, *13 (citing *Cleburne*, 473 U.S. at 440).

The rigorous standard of review applicable to an ADA and Rehab action has no parallel to the forgiving standard that the Court applies to equal protection claims. The Eleventh Circuit, however, failed to apply an appropriate equal protection analysis to this case. This issue must be examined in the light of *Kimel*.

B. The ADA and the Rehab Act lack the necessary predicate for Congressional abrogation of Eleventh Amendment immunity: an established pattern or practice of unconstitutional conduct by the states.

This Court has made it clear that an absence of any record of unconstitutional discrimination by states is a strong indication that Congress does not have sufficient reason to enact "broad prophylactic legislation." *Kimel*, 2000 U.S. LEXIS at *53. Here, there is simply a lack of evidence in the legislative history of the ADA of any

pattern, much less a widespread manifestation, of discrimination by states. In fact, there is much evidence to the contrary: State governments on the whole have been proactive in promoting the rights of the disabled. *See* Hearings before the Committee on Labor and Human Resources and the Subcommittee on the Handicapped, U.S. Senate, 101st Congress, 1st Session, S.933, Senate Hearing 101-156 at 75-85 (May 10, 1989) (state establishment of disability advocacy divisions); Hearing before the Subcommittee on Employment Opportunities of the Committee of Education and Labor, House of Representatives, 100th Congress, 1st Session, Serial No. 100-31 at 16 (June 17, 1987) (45 states prohibit employment discrimination against handicapped persons).

C. The mandates of the ADA and the Rehab Act are out of proportion to any supposed remedial or preventive object and cannot, therefore, be responsive to, or designed to prevent, unconstitutional behavior.

The ADA and Rehab Act have no more connection to remediating Fourteenth Amendment violations than the youth-based protections invalidated in *Oregon v. Mitchell*, 400 U.S. 112 (1970), the RFRA in *Boerne*, the Lanham Act in *College Savings*, the Patent Remedy Act in *Florida Prepaid*, or the ADEA in *Kimel*. The sheer scope of the demands placed on employers by the ADA and Rehab Act, ranging from anti-retaliation provisions to physical alterations to buildings, belies any reasonable responsiveness. The ADA and Rehab Act impose substantive requirements on state and local governments that are vastly disproportionate to any actual unconstitutional conduct that has allegedly been engaged in by any state.

Further, broad generalizations relating to disabilities are, for obvious reasons, even more likely to serve legitimate state interests than distinctions based on age. *Cf.* 2000 U.S. LEXIS at *41.

Above all else, however, "it simply cannot be said that 'many of [the State employment actions] affected by the Congressional enactment have a significant likelihood of being unconstitutional." *Florida Prepaid*, 119 S. Ct. at 2210.

CONCLUSION

For each of the reasons stated herein, this Court should grant certiorari and reverse the decision below. In the alternative, this Court should hold this petition for a writ of certiorari pending this Court's decision in *Dickson* and either reverse the decision below or vacate that decision and remand this case for reconsideration in the light of *Dickson*.

Respectfully submitted,

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APPENDIX 1

Patricia GARRETT, Plaintiff-Appellant,

v.

The UNIVERSITY OF ALABAMA AT BIRMINGHAM BOARD OF TRUSTEES, Defendant-Appellee, The United States of America, Intervenor.

Milton Ash, Plaintiff-Appellant,

v.

Alabama Department of Youth Services, Defendant-Appellee, The United States of America, Intervenor.

Nos. 98-6069, 98-6070.

United States Court of Appeals, Eleventh Circuit.

Oct. 26, 1999.

Deborah A. Mattison, Richard J. Ebbinghouse, Sandra B. Reiss, Kirsten H. Kowalski, Gordon, Silberman, Wiggins & Childs, P.C., Birmingham, AL, for Plaintiffs-Appellants.

Donna Lenhoff, Washington, DC, Merl Wayman, Columbus, OH, for Amicus AARP and others.

Mark Stern, Alisa Klein, Civil Div., U.S. Dept. of Justice, Washington, DC, for Intervenor.

Lisa Huggins, Birmingham, AL, for Defendant-Appellee in 98-6069.

William J. Samford, II, Alabama Dept. of Youth Services, Mt. Meigs, AL, for Defendant-Appellee in 98-6070.

Appeals from the United States District Court for the Northern District of Alabama.

Before ANDERSON, Chief Judge, RONEY, Senior Circuit Judge, and COOK*, Senior District Judge.

RONEY, Senior Circuit Judge:

These two consolidated cases appeal the grant of summary judgments to two defendant Alabama state agencies on the ground of sovereign immunity. They raise the question that is being litigated in various jurisdictions of whether a state is immune from suits by state employees asserting rights under certain federal laws. The three statutes here are: the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213; Section 504 of the Rehabilitation Act of 1973 (Rehabilitation Act), 29 U.S.C. § 794; and the Family Medical Leave Act of 1993 (FMLA), 29 U.S.C. §§ 2601-2654. Following recent precedent in this Circuit, we hold that the state is not immune from suit under the ADA and the Rehabilitation Act and reverse the judgments of the district court against plaintiffs Patricia Garrett and Milton Ash as to those two statutes and remand the two cases for further proceedings. As to the FMLA, we hold that, although it might well not be immune from suit under certain other provisions of the Act, a decision we need not make, the state is immune from suit under the specific provisions at issue here. We therefore affirm the district court as to the summary judgment on that cause of action against plaintiff Patricia Garrett, the only plaintiff to make a claim under the FMLA.

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* Honorable Julian Abele Cook, Jr., Senior U.S. District Judge for the Eastern District of Michigan, sitting by designation.

Although generally called Eleventh Amendment immunity, which amendment simply bars a federal court from hearing claims against a state by a citizen of another state,[1] it has long been recognized that each state is a sovereign entity in our federal system and is not amenable to suit by an individual without its consent. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) and *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890).

Under certain circumstances, however, the United States Congress can pass laws which give individual citizens a right of action in federal court against an unconsenting state. Those circumstances require first, that "Congress has 'unequivocally expresse[d] its intent to abrogate the immunity,' " which "must be obvious from 'a clear legislative statement,' " and second, that Congress has acted "pursuant to a valid exercise of power." *Seminole Tribe of Florida v. Florida*, 517 U.S. at 55, 116 S.Ct. 1114.

So far, the Supreme Court has held that Congress can abrogate state immunity only when it acts pursuant to section 5, the enforcement provision of the Fourteenth Amendment to the Constitution, which provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5. The Court has held that Congress does

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[1] The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of Subjects of any Foreign State. U.S. Const. amend. XI.

not have authority to abrogate state sovereign immunity when it acted only pursuant to the Commerce Clause. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996).

This frames the issue in this field of developing law: were these three statutes passed with the unequivocal and clear intent to give individuals a right of action against a state, and do these statutes reflect a valid exercise of congressional power under the Fourteenth Amendment.

The Supreme Court has laid out a few guidelines in recent cases. In *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), the Court struck down the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb-1 (1994), an act that Congress purportedly passed pursuant to its Fourteenth Amendment enforcement powers, and in direct response to the Supreme Court's decision in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). In *Smith*, the Court had held that the Free Exercise Clause of the First Amendment does not require states to justify by a compelling interest generally applicable, neutral laws that coincidentally burden religious practices. *See Smith*, 494 U.S. at 885-887, 110 S.Ct. 1595. In direct response to *Smith*, Congress passed RFRA, which required all laws that burden a group's religion, even neutral laws of general applicability, to be narrowly tailored and justified by a compelling interest. *See* 42 U.S.C. § 2000bb-1. In striking down RFRA, the Supreme Court warned that section 5 of the Fourteenth Amendment grants Congress power to enforce the Fourteenth Amendment, not to define the substance of the

amendment, so that Congress' power is remedial in nature. *See Boerne*, 521 U.S. at 519, 117 S.Ct. 2157. To qualify as remedial, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." 521 U.S. at 520, 117 S.Ct. 2157.

In *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, ___ U.S. ___, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999), a patentee brought an action against a state agency alleging infringement of a patented apparatus and method for administering college investment programs. The Court held that the Patent and Plant Variety Protection Remedy Clarification Act could not be sustained under the *City of Boerne* analysis as legislation enacted to enforce any guarantee of the Fourteenth Amendment. *See College Savings Bank*, 119 S.Ct. at 2202. In looking at whether the Patent Remedy Act was remedial or preventive legislation, the Court stated, "we must first identify the Fourteenth Amendment 'evil' or 'wrong' that Congress intended to remedy, guided by the principle that the propriety of § 5 legislation 'must be judged with reference to the historical experience . . . it reflects.' " *College Savings Bank*, 119 S.Ct. at 2207, citing *City of Boerne*, 521 U.S. at 525, 117 S.Ct. 2157. The Court then looked to the legislative history to see if there was evidence of a pattern of constitutional violations perpetrated by the states, such as there were in the voting rights cases, and found none. The Court noted that Congress barely considered the availability and constitutional adequacy of state law remedies. The Court noted that while the "lack of support in the legislative record is not determinative . . . identifying the targeted constitutional

wrong or evil is still a critical part of our § 5 calculus. . . ." 119 S.Ct. at 2209. The Court said that the record offered only "scant support for Congress' conclusion that states were depriving patent owners of property without due process of law by pleading sovereign immunity in federal court patent actions." 119 S.Ct. at 2209.

With these guidelines in mind, we consider each of the acts at issue in this case.

I. The ADA

Congress having unequivocally expressed its intent for the ADA to abrogate sovereign immunity, 42 U.S.C. § 12202 (1994) ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of [the ADA]."), this Court in *Kimel v. State Bd. of Regents* 139 F.3d 1426, 1433 (11th Cir.1998), *cert. granted*, ___ U.S. ___, 119 S.Ct. 901, 142 L.Ed.2d 901 (1999) has already held that the ADA is a valid exercise of the Enforcement Clause of the Fourteenth Amendment and that the states do not have sovereign immunity from claims brought under the ADA. We note that *Kimel* reversed a district court decision and was decided by our Court after the district court had made its determination in this case. We, of course, are bound by the decision of the Court in *Kimel*. *See United States v. Woodard*, 938 F.2d 1255, 1258 (11th Cir.1991), *cert. denied*, 502 U.S. 1109, 112 S.Ct. 1210, 117 L.Ed.2d 449 (1992). We note also that certiorari has been granted in *Kimel* and

any resulting decision of the Supreme Court will probably catch up with this case before a final determination of the merits of the plaintiffs' claims.

We, therefore, reverse the summary judgment entered for the University of Alabama at Birmingham Board of Trustees and against Patricia Garrett on her ADA claim in Appeal No. 98-6069 (D.C. Docket No. CV-97-AR-92-S), and the summary judgment for the Alabama Department of Youth Services and against Milton Ash on his ADA claim in Appeal No. 98-6070 (D.C.Docket No. CV-97-AR-2179-S), and remand for further proceedings.

II. The Rehabilitation Act

In our judgment, the decision under the Rehabilitation Act is also controlled by this court's decision as to the ADA in *Kimel*. The language of the Rehabilitation Act as to congressional intent to abrogate a states' immunity from suit in federal court is as clear as it was under the ADA. *See* 42 U.S.C. § 2000d-7(a)(1) (1994) ("A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of Section 504 of the Rehabilitation Act of 1973. . . . "). The statutes serve the same purpose and were born of the same history of discrimination:

> The Supreme Court has previously held that the disabled are protected against discrimination by the Equal Protection Clause. *See City of Cleburne*, 473 U.S. at 450, 105 S.Ct. at 3259-60. Here, the purpose of both the ADA and section 504 of the Rehabilitation Act is to prohibit discrimination against the disabled. *See* 42 U.S.C. § 12101(b)

> (ADA); 29 U.S.C. § 701(b)(1)(F) (Rehabilitation Act). In both acts, Congress explicitly found that persons with disabilities have suffered discrimination. *See* 42 U.S.C. § 12101(a) (ADA); 29 U.S.C. § 701(a)(5) (Rehabilitation Act). Both the ADA and the Rehabilitation Act therefore are within the scope of appropriate legislation under the Equal Protection Clause as defined by the Supreme Court.

Clark v. State of California, 123 F.3d 1267, 1270 (9th Cir.1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 2340, 141 L.Ed.2d 711 (1998).

We, therefore, reverse the summary judgment entered for the University of Alabama at Birmingham Board of Trustees and against Patricia Garrett on her Rehabilitation Act claim in Appeal No. 98-6069 (D.C. Docket No. CV-97-AR-92-S), and the summary judgment for the Alabama Department of Youth Services and against Milton Ash on his Rehabilitation Act claim in Appeal No. 98-6070 (D.C.Docket No. CV-97-AR-2179-S), and remand for further proceedings.

III. FMLA

Patricia Garrett is the only plaintiff in this consolidated appeal who asserts a claim under the FMLA. Although the FMLA may be most commonly known for its provisions affording employees leave for the birth or adoption of a child or to care for a child, spouse or parent with a serious health condition, the provision at issue here deals with leave for the employee due to her own serious health condition. *See* 29 U.S.C. § 2612(a)(1)(D) ("[A]n eligible employee shall be entitled to a total of 12

workweeks of leave during any 12-month period . . . [b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee.")

Plaintiff Patricia Garrett had worked for the University of Alabama since 1977 and had received several promotions, including one as recently as June 1992, when she was promoted to Director of OB/GYN/Neonatal Services. In August 1994, Garrett was diagnosed with breast cancer and underwent a lumpectomy and continued radiation and chemotherapy treatment through January 1995. Garrett alleges the University of Alabama repeatedly threatened to transfer her to a less demanding job due to her condition. In March 1995, after being told that a subordinate was going to replace her and that she would be sent to a satellite location, Garrett took family medical leave, upon doctor's orders. When she returned, the University demoted her to a position with a significantly lower salary.

Garrett alleges that the University of Alabama violated the FMLA by failing to offer her the same or an equivalent position upon her return, and that the university's actions constitute retaliation under that statute. She seeks damages and equitable relief. The merits of that claim are, of course, not before this Court.

The expression of congressional intent in the FMLA is less clear than in the ADA and the Rehabilitation Act. Plaintiffs rely upon the fact that the FMLA defines an employer to include a state or state entity, *see* 29 U.S.C. § 2611(3), 203(e)(2)(c), and the statute's enforcement provision, which provides that "any employer" who violates

the FMLA shall be liable for a variety of penalties including "wages, salary, employment benefits . . . liquidated damages . . . and for such equitable relief as may be appropriate. . . . " 29 U.S.C. § 2617. Judge Edmondson rejected a virtually identical argument with regard to the ADEA. *See Kimel*, 139 F.3d at 1431-32. Accord *Humenansky v. Regents of the Univ. of Minnesota*, 152 F.3d 822 (8th Cir.1998), *pet. for cert. filed*, 67 U.S.L.W. 3504 (Feb. 1, 1999). But *see Cooper v. New York State Office of Mental Health*, 162 F.3d 770 (2d Cir.1998), *pet. for cert. filed*, 67 U.S.L.W. 3614 (Mar. 23, 1999); *Scott v. Univ. of Mississippi*, 148 F.3d 493 (5th Cir.1998); *Coger v. Board of Regents*, 154 F.3d 296 (6th Cir.1998), *pet. for cert. filed*, 67 U.S.L.W. 3364 (Nov. 16, 1998); *Goshtasby v. Board of Trustees*, 141 F.3d 761 (7th Cir.1998); *Keeton v. Univ. of Nevada Sys.*, 150 F.3d 1055 (9th Cir.1998); *Migneault v. Peck*, 158 F.3d 1131 (10th Cir.1998), *pet. for cert. filed*, 67 U.S.L.W. 3496 (Jan. 20, 1999).

Without deciding this issue, which the Supreme Court will probably resolve in consideration of its grant of certiorari in *Kimel*, we hold in this case that Congress did not have the authority to abrogate the sovereign immunity of the states on claims arising under the provision at issue here. Thus we affirm the district court under the second prong of the test set forth in *Seminole Tribe of Florida*, 517 U.S. at 54, 116 S.Ct. 1114 (1996).

In discussing Congress' enforcement power, the Supreme Court emphasized that its power is "remedial." *City of Boerne*, 521 U.S. at 519, 117 S.Ct. 2157. Congress acts within its authority under the Fourteenth Amendment if the court can perceive a basis upon which Congress might predicate a judgment that the state action "constituted an invidious discrimination in violation of

the Equal Protection Clause." *Katzenbach*, 384 U.S. at 656, 86 S.Ct. 1717. In other words, "we must first identify the Fourteenth Amendment 'evil' or 'wrong' that Congress intended to remedy, guided by the principle that the propriety of any § 5 legislation 'must be judged with reference to the historical experience . . . it reflects.' " *College Savings Bank*, 119 S.Ct. at 2207, citing *City of Boerne*, 521 U.S. at 525, 117 S.Ct. 2157.

Although the statute invokes the Equal Protection Clause in its purpose section, it is not in relation to the provision allowing leave to an employee with a serious health condition.

> The statute states as its first two purposes:
>
> (1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;
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> (2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition.

29 U.S.C. § 2601(b)(1),(2).

> The statute seeks to accomplish these purposes
>
> (4) . . . in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-

> related disability) and for compelling family reasons, on a gender-neutral basis; and
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> (5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

29 U.S.C. § 2601(b)(4),(5).

In reviewing the legislative history, we found only scant references to this provision. Serious health conditions are not necessarily related to family and gender discrimination. Plaintiffs pointed us to passages of the Senate Report, which contained the story of a cancer patient who, despite her good work history was fired after developing colon cancer; and to the more extensive testimony of the vice president of the National Coalition for Cancer Survivorship, who testified with regard to the type and underlying causes of discrimination suffered by cancer survivors. She also testified that "25 percent of all cancer survivors, over one million Americans, experience some form of employment discrimination solely because of their cancer history." This type of anecdotal legislative history is insufficient to indicate Congress had identified particular unconstitutional actions by the states involving serious health conditions irrespective of gender or family situations.

Plaintiffs contend that one of the FMLA's principal purposes is to prevent gender discrimination and to protect women from employment discrimination due to issues regarding pregnancy, child care, and caretaking of family members. Assuming this is so, plaintiffs have

failed to make even a faint connection between this purpose and the particular section of the statute under review.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

COOK, Senior District Judge, concurring in part and dissenting in part:

I.

I concur with my brethren that the decision below with respect to the Americans With Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213, and Section 504 of the Rehabilitation Act of 1973 (Rehabilitation Act), 29 U.S.C. § 794, must be reversed because this circuit's prior decision in *Kimel v. State of Florida Board of Regents*, 139 F.3d 1426 (11th Cir.1998), is controlling.[1]

II.

However, I respectfully dissent from the holding that the States' Eleventh Amendment immunity was not validly abrogated by the provisions of the Family Medical Leave Act of 1993 (FMLA), 29 U.S.C. §§ 2601-2654, which are at issue in the case brought by the Appellant, Patricia Garrett, against the Appellee, the Board of Trustees for the University of Alabama in Birmingham (UAB).

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[1] *See also Seaborn v. State of Florida Dep't Corrections*, 143 F.3d 1405, 1407 (11th Cir.1998).

A.

The outcome of this appeal is governed by the analytical framework that the Supreme Court has established with regard to the Eleventh Amendment grant of immunity to the states from federal court litigation, and the abrogation thereof pursuant to Section Five of the Fourteenth Amendment. The Eleventh Amendment reads:

> [t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

"While the Amendment by its terms does not bar suits against a State by its own citizens, this Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Edelman v. Jordan*, 415 U.S. 651, 662-63, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). The Eleventh Amendment also immunizes state agents and state instrumentalities. *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425, 429, 117 S.Ct. 900, 137 L.Ed.2d 55 (1997). However, the Eleventh Amendment does not prohibit federal courts from entertaining private actions against state officers for injunctive relief. *See Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

The Supreme Court considered the scope of the states' Eleventh Amendment immunity in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). In the course of that decision, the Court validated a two-part test to determine "whether

Congress has abrogated the States' sovereign immunity . . . first, whether Congress has 'unequivocally expresse[d] its intent to abrogate the immunity,' and second, whether Congress has acted 'pursuant to a valid exercise of power.' " *Id.* at 55, 116 S.Ct. 1114 (citation omitted) (quoting *Green v. Mansour*, 474 U.S. 64, 68, 106 S.Ct. 423, 88 L.Ed.2d 371 (1985)). Although the Court overruled *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989), by holding that the Interstate Commerce Clause, U.S. Const. Art. I, § 8, cl. 3, did not empower Congress to unilaterally abrogate the Eleventh Amendment's grant of state immunity, it recognized that Section Five of the Fourteenth Amendment was a valid means of doing so. *Seminole Tribe*, 517 U.S. at 59-66, 116 S.Ct. 1114. Section Five of the Fourteenth Amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article," U.S. Const. amend. XIV, § 5, which includes the guarantee that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws," U.S. Const. amend. XIV, § 1.

The Supreme Court has provided guidance concerning the circumstances in which Congress may validly invoke the Fourteenth Amendment's Equal Protection Clause to abrogate the immunity granted to states by the Eleventh Amendment. The test is whether the statute (1) may be regarded as an enactment to enforce the Equal Protection Clause, (2) is plainly adapted to that end, and (3) is not prohibited by, but is consistent with, the letter and spirit of the Constitution. *Katzenbach v. Morgan*, 384 U.S. 641, 651, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966).

Recently, the Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), added constraints to this test by emphasizing that the power granted to Congress by Section Five of the Fourteenth Amendment was (1) an enforcement or remedial authority, as opposed to a license to substantively define the Fourteenth Amendment's protections, and (2) limited by a requirement of congruence or proportionality between the relevant legislation and the injury sought to be remedied or prevented. Although the Supreme Court did not so specify, it appears that these considerations apply to the second and third *Morgan* factors.

Flores presented the issue of whether the Religious Freedom Restoration Act of 1993 (RFRA) was validly promulgated under Congress' Fourteenth Amendment power to enforce the Free Exercise Clause. Through the RFRA, Congress had invoked its power under Section Five of the Fourteenth Amendment in an effort to counteract the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), which held that neutral, generally applicable laws may be applied to inhibit religious practices even when not supported by a compelling governmental interest. *Flores*, 521 U.S. at 512-14, 117 S.Ct. 2157. Reviewing Fourteenth Amendment jurisprudence, the Supreme Court emphasized that Congress is granted an enforcement, or remedial, power under the Fourteenth Amendment, but that:

> [t]he design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on

> the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation.

Flores, 521 U.S. at 519, 117 S.Ct. 2157. The Court found that (1) "[t]he remedial and preventive nature of Congress' enforcement power, and the limitation inherent in the power, were confirmed in our earliest cases on the Fourteenth Amendment," and further (2) "[a]ny suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law." *Id.* at 524, 527, 117 S.Ct. 2157. The limits to Congress' Fourteenth Amendment powers are necessary because:

> [i]f Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it." Under this approach, it is difficult to conceive of a principle that would limit congressional power. Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.

Id. at 529, 117 S.Ct. 2157 (citation omitted) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803)).

The Supreme Court recognized that, as with many constitutional doctrines, application of these abstract principles to specific facts can be difficult.

> While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed.

Flores, 521 U.S. at 519-20, 117 S.Ct. 2157. The *Flores* majority emphasized the necessity, when making these distinctions, of assuring a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end" because "[l]acking such a connection, legislation may become [impermissibly] substantive in operation and effect." *Id.* at 520, 117 S.Ct. 2157. This theme of proportionality between the statutory means and the ends to be achieved was repeated throughout the opinion, *see id.* at 530, 533, 117 S.Ct. 2157, and was indeed the determinative factor in the Court's analysis of the RFRA, *see id.* at 532, 117 S.Ct. 2157. Thus, the Court held that Congress exceeded its enforcement or remedial powers under the Fourteenth Amendment when it enacted the RFRA because

> RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections. . . .

> . . . Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. RFRA's restrictions apply to every agency and official of the Federal, State, and local Governments. RFRA applies to all federal and state law, statutory or otherwise, whether adopted before or after its enactment. RFRA has no termination date or termination mechanism. Any law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion.
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> . . . .
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> The substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause. . . . Simply put, RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion.

Id. at 532, 534, 117 S.Ct. 2157. In sum, because of the necessity for proportionality between the injury and the statutory remedy, the Supreme Court concluded that there had been an insufficient showing that religious bias was a pervasive enough problem to warrant the sweeping applicability of the RFRA. *See id.* at 530-32, 117 S.Ct. 2157.

B.

The FMLA sets national minimum standards for family and medical leave in employment. In specified situations, such as when oneself or a family member requires care due to a serious health problem or pregnancy-related issue, the FMLA requires covered employers to provide twelve weeks of unpaid leave per year. *See* 29 U.S.C. § 2612(a). Employers must place an employee returning from such leave into the position that had been held when the leave commenced, or to an equivalent position. 29 U.S.C. § 2614(a). Inhibiting covered employees from exercising their FMLA rights, or retaliating against them for doing so, is prohibited. *See* 29 U.S.C. § 2615(a).

In the present appeal, the District Court ruled that Congress lacked authority under the Fourteenth Amendment to make the States subject to a private damages suit in federal court for asserted FMLA violations.[2] *Garrett v. Board of Trustees of University of Alabama*, 989 F.Supp. 1409, 1412 (N.D.Ala.1998). Although it acknowledged that the FMLA had an explicit goal of assuring equal protection, the court below simply considered those statutory declarations "self-serving" and "insufficient to accomplish [the FMLA's] purpose." *Garrett*, 989 F.Supp. at 1412. In my opinion this holding was erroneous because Congress validly abrogated the States' Eleventh Amendment immunity when it passed the FMLA.

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[2] Three other district courts that have considered the issue have reached the same result. *Driesse v. Florida Bd. of Regents*, 26 F.Supp.2d 1328 (M.D.Fla.1998); *McGregor v. Goord*, 18 F.Supp.2d 204 (N.D.N.Y.1998); *Thomson v. Ohio State Univ. Hosp.*, 5 F.Supp.2d 574 (S.D.Ohio 1998).

(1)

I would answer the first *Seminole Tribe* inquiry, which asks whether Congress unequivocally expressed its intent to abrogate the immunity granted to the states by the Eleventh Amendment, *Seminole Tribe*, 517 U.S. at 55, 116 S.Ct. 1114, in the affirmative. This intent "must be obvious from 'a clear legislative statement,' " *id.* (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991)), and " 'unmistakably clear in the language of the statute,' " *Dellmuth v. Muth*, 491 U.S. 223, 227-28, 109 S.Ct. 2397, 105 L.Ed.2d 181 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985)). "[E]vidence of congressional intent must be both unequivocal and textual." *Dellmuth*, 491 U.S. at 230, 109 S.Ct. 2397. The FMLA satisfies this test.

The FMLA defines an "employer" to "include[ ] any 'public agency,' as defined in section 203(x) of this title." 29 U.S.C. § 2611(4)(A)(iii). Section 203(x), which is actually part of the Fair Labor Standards Act (FLSA), defines "public agency" as including "the government of a State or political subdivision thereof; . . . a State, or a political subdivision of a State" 29 U.S.C. § 203(x). Similarly, the word "employee" is defined to encompass "any individual employed by an employer," and the FMLA further specifies that "[i]n the case of an individual employed by a public agency," the term refers, with certain exceptions not relevant here, to "any individual employed by a State, [or] political subdivision of a State." 29 U.S.C. §§ 2611(3), 203(e)(1), 203(e)(2)(C). These FMLA provisions unmistakably intend to subject state employers to the Act's protections.

Any doubt as to whether Congress intended to authorize damages to be claimed against the states pursuant to a private FMLA suit in federal court, which would necessarily require the abrogation of the Eleventh Amendment's immunity, is erased by the FMLA's enforcement provisions. One of those provides that any covered employer violating the Act will be subject to a suit for damages by any covered employee. 29 U.S.C. § 2617(a)(1)(A). Importantly, another states that:

> [a]n action to recover the damages or equitable relief prescribed in paragraph (1) may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees.

29 U.S.C. § 2617(a)(2).

UAB argues that these textual provisions do not sufficiently demonstrate a congressional intention to abrogate the Eleventh Amendment. According to UAB, the statutory cross-referencing that is necessary to discern that a "public agency" includes state governmental employers is fatal to such a finding. However, this does not provide a principled basis for disposing of the issue. For example, as UAB recognizes, in *Seminole Tribe* the Supreme Court found a clear legislative intent to abrogate the Eleventh Amendment based on repeated references to the state and the remedies made available against it in numerous subsections of a particular federal statute. *Seminole Tribe*, 517 U.S. at 56-57, 116 S.Ct. 1114 (reviewing subsections (A)(I), (B)(ii)(II), (B)(iii), (B)(iv), (B)(v), (B)(vi), and (B)(vii) of 25 U.S.C. § 2710(d)(7)); *see also Fitzpatrick v. Bitzer*, 427 U.S. 445, 448-49 & n. 2, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976). The reason why

numerous subsections of one statute, when read together, could be deemed sufficient to indicate an intent to abrogate, but cross-references to various statutes could not, is a mystery. Such an approach would violate the familiar command that statutes are to be read as a whole. "We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, we must not be guided by a single sentence or member of a sentence, but (should) look to the provisions of the whole law, and to its object and policy." *Richards v. United States*, 369 U.S. 1, 11, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962) (footnotes and internal quotations omitted). An exception to this general principle is not warranted out of deference for the Eleventh Amendment and the important role that sovereignty plays in the federal system. As UAB acknowledges, Congress is not required to use the "magic words" in order to effectively overcome the Eleventh Amendment. *Varner v. Illinois State Univ.*, 150 F.3d 706, 711 (7th Cir.1998); *Ussery v. Louisiana*, 150 F.3d 431, 435 (5th Cir.1998); *see also EEOC v. Wyoming*, 460 U.S. 226, 243 n. 18, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983).

UAB asserts that the FMLA's explicit grant of federal court jurisdiction to enforcement suits by the Secretary of Labor for either damages or injunctive relief, 29 U.S.C. §§ 2617(b)(2), (d), supports its position that § 2617(a)(2) only created a cause of action for damages in federal court against public agencies that are not shielded from such actions by the Eleventh Amendment because otherwise the latter would have equally explicit language as the former. Essentially, UAB argues that an abrogation of the Eleventh Amendment may occur only when an act of

Congress contains an explicit and separate statutory grant of jurisdiction in federal court for private damages suits against the states. That contention is but a repackaging of the already discredited "magic words" argument. The plain language of § 2617(a)(2) is perfectly clear: "[a]n action to recover . . . damages . . . may be maintained against any employer (including a public agency) in any Federal . . . court of competent jurisdiction by any one or more employees." The fact that § 2617(a)(2) also grants state courts jurisdiction over FMLA suits, as well as federal court jurisdiction over suits seeking equitable relief, does not provide a basis for ignoring its language that an employee may bring a private cause of action for damages in federal court. UAB's argument that *Blatchford* supports its reasoning must be rejected. In *Blatchford*, the Supreme Court ruled that the Eleventh Amendment was not abrogated based on a general grant of federal jurisdiction over "all civil actions." 501 U.S. at 786, 111 S.Ct. 2578. By contrast, § 2617(a)(2) clearly does more than merely provide a general grant of jurisdiction in federal court.

Two cases that UAB heavily relies upon do not support the conclusion that Congress failed to unequivocally demonstrate its intent to abrogate the Eleventh Amendment through the FMLA. The first is *Dellmuth*.[3] That

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[3] In *Dellmuth*, the Supreme Court concluded that three provisions of the Education of the Handicapped Act (EHA) did not suffice to indicate a clear intent to abrogate the Eleventh Amendment: (1) the preamble, which provided that it was in the national interest for the federal government to assist the states in the subject area in question, (2) a statute, which allowed an aggrieved party to bring a civil action in federal court under the

decision implied that a clear provision concerning the parties which are subject to suit under the Education of the Handicapped Act might suffice as an expression of intent to abrogate the Eleventh Amendment. *Dellmuth*, 491 U.S. at 231, 109 S.Ct. 2397. As set forth above, the FMLA unquestionably contains such a provision, which clearly includes state employers within its coverage. 29 U.S.C. §§ 2617(a)(1)(A), (a)(2).

The second case that UAB emphasizes is *Kimel*. According to UAB, *Kimel*, where this circuit held that the Age Discrimination in Employment Act (ADEA) did not abrogate the Eleventh Amendment, has effectively answered the same issue with respect to the FMLA because the two Acts contain similar relevant statutory language. But UAB overstates the holding in *Kimel*, where only one member of the panel, Judge Edmondson, held that Congress had failed to sufficiently indicate its intent to abrogate the Eleventh Amendment with the ADEA. *Kimel*, 139 F.3d at 1430-33. Another member of the panel, Judge Cox, although agreeing with the conclusion that the states' Eleventh Amendment immunity was not abrogated by the ADEA, expressly declined to rule on whether a sufficient intent to abrogate was evident in that Act. *Kimel*, 139 F.3d at 1444-45. The third panel member, Chief Judge Hatchett, dissented on this issue, concluding that "Congress effectively abrogated the states' sovereign

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EHA, and (3) a 1987 amendment, which clarified that a provision reducing attorney's fees would not apply if a state agency unreasonably protracted the final resolution of the litigation or a violation of the EHA had occurred. *Dellmuth*, 491 U.S. at 228, 231-32, 109 S.Ct. 2397.

immunity under the Eleventh Amendment." *Kimel*, 139 F.3d at 1434-35. Thus, *Kimel* does not control on the issue of intent to abrogate.

Moreover, Judge Edmondson's position in *Kimel* is unpersuasive because it accepts that a sufficient intent to abrogate cannot be discerned from reading in concert separate statutory provisions in an Act of Congress.

> This statutory structure does not provide the clarity needed to abrogate States' constitutional right to sovereign immunity. For abrogation to be unmistakably clear, it should not first be necessary to fit together various sections of the statute to create an expression from which one might infer an intent to abrogate. Although we make no definite rule about it, the need to construe one section with another, by its very nature, hints that no unmistakable or unequivocal declaration is present.

Kimel, 139 F.3d at 1431; accord *Driesse v. Florida Bd. of Regents*, 26 F.Supp.2d 1328, 1331-32 (M.D.Fla.1998). As explained above, such an approach unjustifiably creates an Eleventh Amendment exception to the axiom that federal Acts are to be read as a whole. Judge Edmondson also appears to have applied a more stringent textual requirement than is generally understood to apply to this first *Seminole Tribe* factor.

> No unequivocal expression of an intent to abrogate immunity is unmistakably clear in the ADEA. No reference to the Eleventh Amendment or to States' sovereign immunity is included. Nor is there, in one place, a plain, declaratory statement that States can be sued by individuals in federal court. To me, an intent on

> the part of Congress to abrogate the States' constitutional right to immunity [in the ADEA] is not sufficiently clear to be effective under Eleventh Amendment jurisprudence.

Kimel, 139 F.3d at 1430-31. No less of a strict textualist than Justice Scalia has expressly disavowed such an approach. "I join the opinion of [four other Justices of] the Court, with the understanding that [their] reasoning does not preclude congressional elimination of sovereign immunity in statutory text that clearly subjects States to suit for monetary damages, though without explicit reference to state sovereign immunity or the Eleventh Amendment." *Dellmuth*, 491 U.S. at 233, 109 S.Ct. 2397 (Scalia, J., concurring). For all these reasons, *Kimel* does not control on the issue of whether Congress sufficiently indicated an intent to abrogate the Eleventh Amendment when it passed the FMLA.

Importantly, *Thomas v. Louisiana*, 534 F.2d 613, 614 & n. 4 (5th Cir.1976),[4] lends support to the Garrett's position that Congress intended to abrogate Eleventh Amendment immunity through passage of the FMLA. As the Fifth Circuit recognized in *Thomas*, Congress amended the Fair Labor Standards Act (FLSA) by adding the following language for the express purpose of superseding a Supreme Court holding that the FLSA lacked a clear intent to abrogate:[5]

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[4] Fifth Circuit Court of Appeals (Fifth Circuit) decisions issued before October 1, 1981 are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209-11 (11th Cir.1981) (en banc).

[5] The Supreme Court had so ruled in *Employees of the Department of Public Health & Welfare v. Department of Public*

> [a]ction to recover such liability may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

Thomas, 534 F.2d at 614 & n. 4 (quoting 29 U.S.C. § 216(b) (1970)). This language is almost identical to that used by Congress in 29 U.S.C. § 2617(a)(2) of the FMLA. Moreover, when reviewing the current language from § 216(b) of the FLSA,[6] which remains substantially identical after further amendment, the Second Circuit Court of Appeals held that it "evince[d] a clear intent to abrogate the States' sovereign immunity by allowing suit in federal courts." *Close v. State of New York*, 125 F.3d 31, 36 (2d Cir.1997). Therefore, when taken in conjunction with the FMLA's statutory provisions that identify state employees as potential plaintiffs and their state employers as potential defendants, I believe that the best result is to conclude that the FMLA contains an unmistakably clear intent to abrogate the states' Eleventh Amendment immunity.

Health & Welfare, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973).

[6] "An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated."

(2)

In my opinion, the second *Seminole Tribe* factor, which asks whether Congress was acting pursuant to a valid exercise of power when it promulgated the FMLA, *Seminole Tribe*, 517 U.S. at 55, 116 S.Ct. 1114, is also satisfied. Congress stated that the FMLA was being passed:

> (4) to accomplish the purposes described [herein] in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and
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> (5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

29 U.S.C. § 2601(b). This explicit invocation of the Fourteenth Amendment's Equal Protection clause is sufficient to establish that Congress was acting pursuant to Section Five of the Fourteenth Amendment when it passed the FMLA.[7] *See Morgan*, 384 U.S. at 652, 86 S.Ct.

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[7] Additionally, the implementing regulations are as explicit that Congress acted pursuant to the authority granted it by the Fourteenth Amendment.

> . . . It was intended that the Act accomplish [its] purposes . . . in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment in minimizing the potential for employment discrimination on the basis of sex, while promoting equal employment opportunity for men and women.

1717. As the Supreme Court made clear in *Seminole Tribe*, 517 U.S. at 59-60, 116 S.Ct. 1114, Section Five authorizes Congress to validly abrogate the Eleventh Amendment.

Therefore, the analysis proceeds to whether the FMLA was a valid exercise of Congress' Fourteenth Amendment power, and applies the three-part test from *Morgan*. Given that Congress has explicitly invoked the goal of equal protection when passing the FMLA, and supported that with extensive legislative findings regarding how the FMLA is designed to guard against gender and disability discrimination,[8] which are unquestionably goals of the Fourteenth Amendment, *see United States v. Virginia*, 518 U.S. 515, 533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 652, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975), *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446-47, 105 S.Ct. 3249, 87

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29 C.F.R. § 825.101(a). The legislative history also indicates that Congress was acting under the Fourteenth Amendment's Equal Protection Clause. S.Rep. No. 103-3, at 16 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 18.

Further, the legislative history of the FMLA indicates that Congress was drawing on its Commerce Clause powers as well, in addition to the Fourteenth Amendment's Due Process Clause. *Id.* However, since the Commerce Clause does not authorize Congress to abrogate the Eleventh Amendment's grant of immunity, *Seminole Tribe*, 517 U.S. at 59-66, 116 S.Ct. 1114, it is irrelevant to Garrett's appeal save for providing an independent basis for validating the FMLA's substantive provisions.

[8] 29 U.S.C. §§ 2601(a), (b)(4) & (5); 29 C.F.R. § 825.101(a); S.Rep. No. 103-3, at 5-12 (1993), reprinted in 1993 U.S.S.C.A.N. 3, 7-14; H.R.Rep. No. 103-8 (1993).

L.Ed.2d 313 (1985), it meets the first *Morgan* factor because it may be regarded as an enactment to enforce the Equal Protection Clause. *See Wilson-Jones v. Caviness*, 99 F.3d 203, 210 (6th Cir.1996) (the simplest way to meet first *Morgan* test is "for Congress to declare explicitly that the legislation is passed to enforce Fourteenth Amendment rights").

The more difficult question is whether the FMLA satisfies the second and third *Morgan* factors, which require that the legislation be (1) plainly adapted to enforce the Equal Protection Clause of the Fourteenth Amendment, and (2) consistent with, and not prohibited by, the letter and spirit of the Constitution. These considerations are constrained by the *Flores* principles that the legislation must (1) be enforcing or remedial in nature, rather than an attempt to make a substantive change to the protections the Fourteenth Amendment affords, and (2) have a congruence and proportionality between the injury to be prevented and the means adopted to that end. The District Court summarily concluded that the FMLA failed these tests, without discussing the *Morgan* factors, and referred to the *Flores* guidelines that illuminate them only in passing.

> The tertiary reliance by [Garrett] on the FMLA implicates the same Congressional reasoning and authority that Congress employed in enacting the ADA and the Rehab Act, with the same result. Although the FMLA does not refer to Section 5 of the Fourteenth Amendment, it does speak of accomplishing its purpose of promoting family integrity "in a manner that, consistent with the Equal Protection Clause of the

> Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex" and that it will "promote the goal of equal employment opportunity for women and men." 29 U.S.C. § 2601(b)(4) and (5). These statutory expressions are no more than self-serving declarations of the kind criticized in *Flores*. Although they do, perhaps, give the FMLA a better chance at asserting control over the FMLA-proscribed employment practices by states than does similarly self-serving language found in the ADA and the Rehab Act, this court finds this statutory language in the FMLA insufficient to accomplish its purpose.

Garrett, 989 F.Supp. at 1412.

Contrary to the district court's holding, the FMLA is a valid exercise of Congress' Fourteenth Amendment powers because it is a justified enforcement measure to address sex and disability discrimination. Congress passed the FMLA in response to employers' sex discrimination in the offering of employee leave time based upon presuppositions about the roles of men and women in families and as caretakers, and of the presupposed need of women and the disabled to time off due to pregnancies and health problems, respectively. There can be no question that it is unconstitutional under the Fourteenth Amendment for a state to discriminate on the basis of sex stereotypes, *see Virginia*, 518 U.S. at 533, 116 S.Ct. 2264; *Weinberger*, 420 U.S. at 643, 95 S.Ct. 1225, or that the Fourteenth Amendment's protections extend to the disabled, *see City of Cleburne*, 473 U.S. at 446-47, 105 S.Ct. 3249.

Nevertheless, during its legislative inquiry Congress found that, due to societal perceptions regarding family roles, employers who offered leave time to women discriminated against men with regard to that employment benefit, either by not offering it, granting a shorter amount than was made available to women, or discouraging men from taking it.[9] Such discrimination against men

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[9] The House of Representatives found that "[d]espite the apparent conflict with Title VII of the Civil Rights Act, only 37 percent of the [ ] companies extend[ed] parental leave to fathers and often on a different (and less extended) basis than to mothers." H.R.Rep. No. 100-511, pt. 2, at 24 (1988); *see also* S.Rep. No. 103-3, at 14-15 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 17 (noting 37% availability of "maternity" leave at businesses with more than 100 workers, compared to only 18% availability of "paternity" leave); 138 Cong. Rec. S12,095, S12,096 (daily ed. August 11, 1992) (remarks of Sen. Kennedy) (noting 1990 Bureau of Labor Statistics study which found that "only 18 percent of fathers at medium and large firms are covered by an unpaid paternity leave policy, and only 6 percent of fathers at small firms had the right to take leave"); The Parental and Medical Leave Act of 1987: Hearings Before the Subcomm. on Children, Families, Drugs and Alcoholism of the Senate Comm. on Labor and Human Resources, Part 2, 100th Cong. 536 (1987) [hereinafter Hearings: Leave Act of 1987, Part 2] (statement of Professor Susan Deller Ross, Georgetown University Law Center) ("[T]here are a number of studies . . . in which it's shown that employers in this country that are giving family leaves to their workers are not giving it non-discriminatorily, they are, by and large, giving it only to women, not to men. It's fairly flagrant discrimination."); The Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcomm. on Labor Management Standards of the House Comm. on Education & Labor, 99th Cong. 146, 147 (1986) [hereinafter Hearings: Leave Act of 1986] (statement of Washington Council of Lawyers) ("Parental leave for fathers . . . is rare. . . . Where child-care leave policies do exist, men . . . receive notoriously discriminatory

is unconstitutional. "[A] father, no less than a mother, has a constitutionally protected right to the companionship, care, custody, and management of the children he has sired and raised." *Weinberger,* 420 U.S. at 652, 95 S.Ct. 1225 (internal quotation and citation omitted).

By the same token, Congress also found that women experienced discrimination related to leave time, in that employers' perceptions that women served as caretakers and therefore were more likely to ask for leave time contributed to a decreased willingness to hire women in

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treatment in their request for such leave."); *id.* at 99, 101 n. 2 (statement of Women's Legal Defense Fund, citing Catalyst, Report on a National Study of Parental Leaves, 30, 37 (1986)) ("[B]ecause of sex discrimination against men, some working fathers may find it more difficult than their female counterparts to be permitted to accommodate family responsibilities without suffering adverse employment consequences. In a recent study by Catalyst, an independent research firm, 51.8% of companies surveyed reported that they give parental leave to mothers, but only 37.0% reported that they provide such leave to fathers – even though such a sex-base differential clearly violates existing law."); *id.* at 21 (statement of Thomas Donahue for AFL-CIO) (drawing on national experience with union contracts and corroborating lack of policies permitting working fathers to take time off for family responsibilities). *See generally Schafer v. Board of Public Education,* 903 F.2d 243 (3d Cir.1990) (male public school teacher challenged school board's policy of granting one year of child-rearing leave to female employees only); *Knussman v. State of Maryland,* 16 F.Supp.2d 601 (D.Md.1998) (male police officer challenged state's presumption that the mother is the "primary care giver" entitled to additional leave); *Chavkin v. Santaella,* 81 A.D.2d 153, 439 N.Y.S.2d 654 (1981) (male probation officer challenged city probation department's practice of allowing only female employees to use accrued sick leave to extend infant care leave).

the first instance or promote them.[10] In addition, women were rendered more vulnerable to this form of discrimination based on employer concerns that they would need leave time for pregnancies,[11] while the disabled suffered

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[10] 138 Cong. Rec. H8226, H8227 (daily ed. September 10, 1992) (remarks of Rep. Hayes) ("Too often women experience the nightmare of going in to their employer with the news that they are pregnant. Although they are valued employees, up to the moment they became pregnant, suddenly they find themselves unwanted. . . . They are offered an unacceptable choice: Keep a job or raise a family."); Hearings: Leave Act of 1987, Part 2, *supra* note 9, at 173-74 (statement of Peggy Montes, Mayor's Commission on Women's Affairs, City of Chicago) ("Job opportunities for [women with children] are limited, and they often miss pay increases and promotions. The lack of uniform parental and medical leave policies in the work place has created an environment where discrimination is rampant. Very often we are contacted by women workers who are at risk of losing their jobs or have lost them because they are pregnant, [or] gave birth to a child. . . . "); Hearings: Leave Act of 1986, *supra* note 9, at 100 (statement of Women's Legal Defense Fund).

[11] Hearings: Leave Act of 1986, *supra* note 9, at 100 (statement of Women's Legal Defense Fund) ("Historically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second. This prevailing ideology about women's roles has in turn justified discrimination against women when they are mothers or mothers-to-be."); *id.* at 36, 42 n. 48 (statement of National Women's Political Caucus, pointing to amicus brief filed with the Supreme Court by the ACLU in *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, 275, 107 S.Ct. 683, 93 L.Ed.2d 613 (1987)) (stating provision of special legal protections "put women, not on a pedestal, but in a cage"; "[t]he assumption that women will become pregnant and leave the labor market is at the core of the sex stereotyping resulting in unfavorable

from it as well due to employer fears that the health problem would require time off or preclude a return to work after a medical absence.[12] Particularly relevant in this Eleventh Amendment context is that Congress found that public sector employees were suffering comparable sex discrimination problems with regard to leave time as employees in the private sector.[13] Thus, through the FMLA Congress unquestionably sought to protect Fourteenth Amendment Equal Protection interests in response to a demonstrably pervasive discrimination problem.[14]

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disparate treatment of women in the workplace.") (internal quotation and citation omitted).

[12] S.Rep. No. 103-3, at 12 (1993) (testimony regarding employment discrimination against cancer survivors).

[13] Hearings: Leave Act of 1986, *supra* note 9, at 30 (statement of Meryl Frank, Yale Bush Center) ("[P]ublic sector leaves don't vary very much from private sector leaves"); *id.* at 147 (1986) (statement of Washington Council of Lawyers) ("Parental leave for fathers . . . is rare. . . . Where child-care leave policies do exist, men, both in the public and private sectors, receive notoriously discriminatory treatment in their request for such leave.").

[14] Relevant here are two arguments UAB raises which may be quickly disposed of. First, UAB asserts that the FMLA is invalid because it does not protect the constitutional rights of members of a "suspect" or "discrete" class. Second, UAB contends that the FMLA is not an effort to remedy discrimination against a class of persons protected by the Fourteenth Amendment because it reaches all employees, regardless of whether they have been subjected to discrimination. As an initial matter, these arguments misunderstand the applicable jurisprudence. The guarantee of equal protection is not enjoyed only by those having a status that results in a higher standard of review. *See Cleburne*, 473 U.S. at 446-47, 105 S.Ct. 3249 (disabled individuals enjoy equal

Consequently, the concern in *Flores*, 521 U.S. at 530-32, 117 S.Ct. 2157, that the RFRA was not implemented in response to a serious or demonstrated need to protect against religious bigotry is inapplicable to the FMLA.

Further, the FMLA's remedial measures are plainly adapted to enforce the interest in combatting sex and disability discrimination in employment and are consistent with, and not prohibited by, the letter and spirit of the constitution, within the *Flores* constraints of enforcement and proportionality. By setting a minimum standard for family leave for all eligible employees – male and female – the FMLA extends to male workers the types of leave benefits more often available to working women. Just as importantly, by providing male workers with the opportunity for parental leave, the FMLA "help[s] to eliminate the stereotype – no longer valid in today's working world – that women are exclusively responsible for childcare."[15] In addition, by authorizing leave for all serious health conditions rather than only for pregnancy related disabilities, the FMLA discourages discrimination against women of childbearing age.[16]

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protection guarantees despite that disability not a quasi-suspect class). Apart from that, UAB's arguments are incorrect since the FMLA protects against discrimination on the basis of sex and disability, which are protected classes under the Equal Protection clause.

[15] Hearings: Leave Act of 1986, *supra* note 9, at 147 (statement of Washington Council of Lawyers).

[16] S.Rep. No. 102-68, at 35 (1991) ("Because the bill treats all employees who are temporarily unable to work due to serious health conditions in the same fashion, it does not create the risk of discrimination against pregnant women posed by legislation

UAB, by emphasizing the affirmative obligations that the FMLA places on employers and suggesting that this represents a substantive change in the protections the Fourteenth Amendment assures, argues that the FMLA is not merely remedial.[17] However, Congress determined that a mere negative imperative upon employers, in the form of a law prohibiting them from discriminating in the granting of employee leave time on the basis of sex, was insufficient because it had already proven inadequate under Title VII, which already mandated that employers who granted parental leave had to do so equally between the sexes, *see* 42 U.S.C. § 2000e-2(a), and persisted despite protections such as the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), and 42 U.S.C. § 1983.[18] Moreover, the

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which provides job protection only for pregnancy related disability.").

[17] This argument was accepted in *Driesse*, 26 F.Supp.2d at 1333, *McGregor*, 18 F.Supp.2d at 208, and *Thomson*, 5 F.Supp.2d at 579-80, and apparently by the court below, *Garrett*, 989 F.Supp. at 1412.

[18] *See* H.R.Rep. No. 103-8, pt. 1, at 28 (1993); H.R.Rep. No. 100-511, pt. 2, at 22, 24 (1988); Family and Medical Leave Act of 1987: Joint Hearing Before the Subcomm. on Civil Service and the Subcomm. on Compensation and Employee Benefits of the House Comm'n on Post Office and Civil Service, 100th Cong. 31, 32 (1987) (statement of Professor Eleanor Holmes Norton, Georgetown Univ. Law Center) (lack of consistency in employer leave policies based on sex "constitutes a prima facie case of violation of Title VII of the 1964 Civil Rights Act"). Several district courts have reasoned that since Congress had already established protections against this form of sex discrimination in employment, for example through Title VII actions or causes against state employers under 42 U.S.C. § 1983, the addition of the FMLA's remedies rendered that legislation incongruent. *See Driesse*, 26 F.Supp.2d at 1333-34; *Thomson*, 5 F.Supp.2d at 580.

Title VII experience also taught Congress that a mere prohibition was impracticable because it placed too great of an enforcement burden upon employees: the costs of legal challenges to asserted violations were prohibitive, and for those who did not have this problem the time spent litigating negated any eventual positive result.[19]

This experience justifies Congress' choice to impose affirmative obligations upon employers through the FMLA and, contrary to UAB's position, distinguishes the FMLA from the concerns the Supreme Court in *Flores* used to invalidate the RFRA. For example, as even *Flores* recognized, broad and aggressive legislation in the voting rights context to enforce the constitutional guarantees against voting discrimination, including an affirmative duty to submit changes in electoral practices to the Department of Justice for clearance,[20] were within Congress' Fourteenth Amendment powers because they were (1) aimed at actions "with a long history" as " 'notorious means to deny and abridge voting rights on racial grounds,' " and (2) "necessary given the ineffectiveness of the existing voting rights laws and the slow costly character of case-by-case litigation." *Flores*, 521 U.S. at

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However, since Congress determined that these prior efforts to protect against sex discrimination in the offering of employee leave time had proved unsuccessful, the existence of those preexisting protections cannot serve as a basis to conclude that the FMLA lacks congruence.

[19] 139 Cong. Rec. H387 (daily ed. February 3, 1993) (remarks of Rep. Ackerman concerning his lawsuit to obtain parental leave).

[20] *See City of Rome v. United States*, 446 U.S. 156, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980).

526, 533, 117 S.Ct. 2157 (emphasis added and citations omitted) (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 355, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966) (Black, J., concurring and dissenting)). Congress found that an analogous situation existed with respect to sex discrimination in the offering of employee leave time. Given the ineffectiveness of prior attempts to assure compliance in this realm with the Fourteenth Amendment's guarantee of equal protection, Congress was within its powers to take more aggressive remedial measures.

> Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to "enforce" may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations.

City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989).

The Supreme Court in *Flores* warned that congressional invocations of the Fourteenth Amendment could lack the congruence necessary to their validity depending on the degree, and justification therefor, of their "intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." *Flores*, 521 U.S. at 534, 117 S.Ct. 2157. The *Thomson* court appears to have invoked that principle by concluding that the FMLA represents "an inappropriate interference into a traditional area of state sovereignty which runs afoul of the spirit of the Constitution and the concepts of federalism which it contains." *Thomson*, 5

F.Supp.2d at 581; *see also Driesse*, 26 F.Supp.2d at 1334. However, *Thomson* and *Driesse* erred by failing to recognize that, although the regulation of employee leave time might be an area traditionally reserved to the states, Congress' belief that its prior efforts to prohibit unconstitutional sex discrimination in employee leave time, such as through Title VII and its later amendment by the Pregnancy Discrimination Act, 42 U.S.C. §§ 1983, 2000e(k), had been unsuccessful justified its conclusion that a blanket, fixed guarantee of leave time was necessary to "minimize[ ] the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis." 29 U.S.C. § 2601(b)(4); *see also* 29 U.S.C. § 2601(a)(6) ("employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender"); S.Rep. No. 103-3, at 16 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 18 ("A law providing special protection to women or any defined group, in addition to being inequitable, runs the risk of causing discriminatory treatment. S. 5, by addressing the needs of all workers, avoids such a risk"); H.R.Rep. No. 100-511, pt. 2, at 26 (1988)[21].

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[21] "Another significant benefit of the temporary medical leave provided by this legislation is the form of protection it offers women workers who bear children. Since all employees who are temporarily unable to work due to serious health conditions are treated the same under the bill, it does not create the risk of discrimination against pregnant women which is

> Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into "legislative spheres of autonomy previously reserved to the States."

Flores, 521 U.S. at 518, 117 S.Ct. 2157 (quoting *Fitzpatrick*, 427 U.S. at 455, 96 S.Ct. 2666).

Given Congress' legislative findings as to the pervasive problem of sex discrimination in the offering of employee leave time, and lack of success with prior efforts to effectuate anti-discriminatory legislation on that issue, the FMLA's limited measures assure its congruence with the problem that it seeks to remedy and deter. The FMLA (1) applies only to firms employing fifty or more employees (which comprise approximately five per cent of businesses)[22] for at least twenty weeks during a calendar year,[23] (2) protects only employees who have worked for a covered employer for at least one year, during which they must have worked at least 1,250 hours,[24] (3) guarantees only unpaid leave,[25] (4) requires covered

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posed by legislation which provides job protection only for pregnant women. Legislation for pregnant women only give employers an economic incentive to discriminate against women in hiring policies; legislation helping all workers equally does not have this effect."

[22] *See* 138 Cong. Rec. S12,095-96 (daily ed. Aug. 11, 1992) (remarks of Sen. Kennedy).

[23] 29 U.S.C. § 2611(4)(A)(i).

[24] 29 U.S.C. § 2611(2)(A).

[25] 29 U.S.C. § 2612(c).

employees to give thirty days advance notice of foreseeable leave requests, and in that instance mandates a reasonable effort not to unduly disrupt the employer's operations,[26] and (5) allows employers to require the certification of serious medical conditions.[27] Thus, the FMLA certainly can be said to comply with its stated goal of assuring employee protections "in a manner that accommodates the legitimate interests of employers." 29 U.S.C. § 2601(b)(2). Also significant for purposes of the Eleventh Amendment is that Congress found that compliance with the FMLA would be no more burdensome for state, as opposed to private, employers.[28] Nevertheless, it demonstrated a concerted effort to minimize the burden

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[26] 29 U.S.C. § 2612(e).

[27] 29 U.S.C. § 2613.

The extensive series of provisions limiting the scope and burden of the FMLA were noted in the legislative record. 138 Cong. Rec. S12,095-06 (daily ed. August 11, 1992) (remarks of Sen. Kennedy).

[28] Hearing on H.R. 770, the Family and Medical Leave Act of 1989: Hearing Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor, 101st Cong. 45, 53 (1989) (statement of Gerald McEntee, AFSCME) (based on its experience, AFSCME believed that "the FMLA will not levy significant additional costs on state and local governments and if government at all levels can adopt unpaid leave policies, then so can private industry"); Hearings: Leave Act of 1987, Part 2, *supra* note 9, at 305 (statement of Roberta Lynch, AFSCME) (belief that FMLA will not impose significant costs on government "is one of the major reasons why the National Conference of State Legislatures, which represents state legislatures in all 50 states, has endorsed this legislation"; noting "this leave policy has presented very little problems for an employer like the State of Illinois").

that the FMLA did impose on state employers by excluding from its coverage state employees who hold certain high-ranking or sensitive positions. 29 U.S.C. §§ 2611(3), 203(e)(2)(C). The FMLA is therefore substantively distinguishable from the RFRA, which applied without restriction to all governmental acts, whether federal, state, or local, *Flores*, 521 U.S. at 532-34, 117 S.Ct. 2157.

Further, although the district courts in *Thomson*, 5 F.Supp.2d at 580, *McGregor*, 18 F.Supp.2d at 209, and *Driesse*, 26 F.Supp.2d at 1334, found fault with the FMLA on the basis that it imposes a significant financial burden on state employers, this assertion was based on mere speculation and is contrary to Congress' finding that family and medical leave is cost-effective because it results in decreased costs related to hiring, training, turnover, and absenteeism.[29] "When Congress makes findings on essentially factual issues . . . those findings are of course entitled to a great deal of deference, inasmuch as

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[29] S.Rep. No. 103-3, at 12-14, 16-18 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 14-16, 18-21 (noting testimony of small business owners, governmental employers, and chief executive officers, as well as numerous workplace studies by governmental bodies and private institutes; for example, Aetna Life and Casualty Company reportedly saved $2 million in 1991 by reducing employee turnover through implementation of family leave policy, and a study by the Small Business Administration concluded that providing family and medical leave cost employers a minimal $6.70 annually per covered employee); The Family and Medical Leave Act of 1991: Hearing on S. 5 Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Senate Comm. on Labor and Human Resources, 102d Cong. 12, 13, 23, 35, 91 (1991) (noting studies indicating that cost of providing leave would be as inexpensive as $5.30 per employee, on an annual basis).

Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue." *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 330 n. 12, 105 S.Ct. 3180, 87 L.Ed.2d 220 (1985).

Importantly, the FMLA contains a mechanism for reviewing its effectiveness and the burden that it imposes on employers by creating a Commission on Leave to study actual costs and benefits of the Act and report to Congress two years after enactment. 29 U.S.C. § 2632. This represents another distinguishing feature from the RFRA, which the Supreme Court criticized for having no time or enforcement limitations.[30] *Flores*, 521 U.S. at 532-33, 117 S.Ct. 2157. Contrary to the speculation concerning costs in which the *Thomson*, *McGregor*, and *Driesse* courts indulged, the Commission has found that the vast majority of work sites (between 89.2% and 98.5%) reported little or no cost from FMLA compliance in four broad survey areas.[31]

Contrary to the position taken in *McGregor*, 18 F.Supp.2d at 209-10, the FMLA's failure to require a specific finding of discriminatory intent on the part of the employer is not necessarily sufficient to invalidate it. Legislation passed by Congress to combat discrimination through enforcement of the Equal Protection Clause does

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[30] The Supreme Court was careful to clarify that "[t]his is not to say, of course, that § 5 legislation requires termination dates, geographic restrictions or egregious predicates." *Flores*, 521 U.S. at 533, 117 S.Ct. 2157.

[31] Commission on Leave, United States Dep't of Labor, A Workable Balance: Report to Congress on Family and Medical Leave Policies 125-26 (1996).

not always require a showing of discriminatory animus. *See Alexander v. Choate*, 469 U.S. 287, 295-97, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985). Congress, pursuant to the Fourteenth Amendment, may "prohibit laws with discriminatory effects in order to prevent . . . discrimination in violation of the Equal Protection Clause." *Flores*, 521 U.S. at 529, 117 S.Ct. 2157. This is because, as it is generally understood, the Fourteenth Amendment empowers Congress to enact appropriate legislation establishing more exacting requirements than those minimum safeguards provided in the amendment. *See Fullilove v. Klutznick*, 448 U.S. 448, 477, 100 S.Ct. 2758, 65 L.Ed.2d 902, (1980) (plurality opinion); *City of Rome*, 446 U.S. at 177, 100 S.Ct. 1548; *Morgan*, 384 U.S. at 648-51, 86 S.Ct. 1717.

> A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the "majestic generalities" of § 1 of the Amendment.

Morgan, 384 U.S. at 648-49, 86 S.Ct. 1717 (footnote omitted).

Given Congress' findings about the continuing pervasive problem of sex discrimination in the offering of employee leave time despite its previous legislative

attempts to combat that problem through less burdensome legal prohibitions, the FMLA cannot be considered "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Flores*, 521 U.S. at 532, 117 S.Ct. 2157. The widespread nature of the problem that Congress hoped to address through the FMLA, and prior unsuccessful legislative efforts to provide effective protections, justify Congress' imposition of an affirmative duty upon covered employers, particularly because § 5 legislation does not require "egregious predicates." *Flores*, 521 U.S. at 533, 117 S.Ct. 2157. Rather, the FMLA is at the least broadly appropriate "in light of the evil presented," based on the " 'historical experience . . . it reflects,' " *Flores*, 521 U.S. at 525, 530, 117 S.Ct. 2157 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966)), particularly since it contains the types of measured limitations on coverage and enforcement that "tend to ensure Congress' means are proportionate to ends legitimate under § 5," *Flores*, 521 U.S. at 533, 117 S.Ct. 2157. Consequently, given that the FMLA is not subject to the concerns the Supreme Court espoused in *Flores*, this tribunal should defer to Congress' judgment that the Act is an appropriate measure to protect the citizenry from unconstitutional sex discrimination in employment. "It is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." *Flores*, 521 U.S. at 536, 117 S.Ct. 2157 (quoting *Morgan*, 384 U.S. at 651, 86 S.Ct. 1717).

III.

Accordingly, for the reasons that I have explained above, I concur to the extent that the decision below, as it respects the ADA and Section 504 of the Rehabilitation Act, must be reversed due to this circuit's intervening decision in *Kimel v. State of Florida Board of Regents*, 139 F.3d 1426 (11th Cir.1998).

However, I would hold that Congress validly abrogated the States' Eleventh Amendment immunity through passage of the FMLA, and thus respectfully dissent on that issue.

APPENDIX 2

Patricia GARRETT, Plaintiff,

v.

The BOARD OF TRUSTEES OF the UNIVERSITY OF ALABAMA IN BIRMINGHAM, Defendant.
Milton ASH, Plaintiff,

v.

ALABAMA DEPARTMENT OF YOUTH SERVICES, Defendant.

Civil Action Nos. 97-AR-0092, 97-AR-2179-S.

United States District Court,
N.D. Alabama,
Southern Division.

Jan. 13, 1998.

Richard J. Ebbinghouse, Deborah A. Mattison, Sandra B. Reiss, Gordon Silberman Wiggins & Childs, Birmingham, AL, for Patricia Garrett and Milton Ash.

Lisa Huggins, Gary C. Smith, University of Alabama System Office of Counsel, Birmingham, AL, for University of Alabama at Birmingham Board of Trustees.

William J. Samford, II, Elizabeth Addison, Alabama Dept. of Youth Services, Mt. Meigs, AL, Alice Ann Byrne, Office of Atty. Gen., Montgomery, AL, for Alabama Dept. of Youth Services.

MEMORANDUM OPINION

ACKER, District Judge.

In crucial respects the two above-captioned cases, separate and not consolidated, are identical, and, thus, a

single opinion can address defendant's motion for summary judgment in each case. Both cases involve claims by plaintiffs against employers that are instrumentalities of the State of Alabama. Both plaintiffs invoke the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101, et seq., and Section 504 of the Rehabilitation Act of 1973 ("Rehab Act"), 29 U.S.C. §§ 701, et seq. CV 97-AR-0092 distinguishes itself by also invoking the Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. §§ 2601, et seq. Defendants' motions for summary judgment are based on identical contentions that the federal statutes invoked by plaintiffs cannot apply to a state instrumentality and that, despite Congressional intent to abrogate the state's Eleventh Amendment immunity, Congressional intent in that regard exceeds its constitutional authority.

Both defendants concede that, when Congress expressly relied on Section 5 of the Fourteenth Amendment and the Equal Protection Clause in enacting the ADA and the Rehab Act, it fully intended to penetrate defendants' Eleventh Amendment shield in order to make each statute apply to state employers as well as to private employers. The question here, then, is not the question addressed by this court in *MacPherson v. University of Montevallo*, 938 F.Supp. 785 (N.D.Ala.1996), which dealt with the applicability of another statute, the Age Discrimination in Employment Act ("ADEA"), to a state entity. In the ADEA Congress also expressed an intent to override state immunity under the Eleventh Amendment. But, as distinguished from the ADA and the Rehab Act, Congress there invoked only the Commerce Clause as the authorizing vehicle. MacPherson is presently before the

Eleventh Circuit on appeal, and it is under submission in that court. What the Eleventh Circuit will say in MacPherson may or may not assist in deciding future cases like these.

The United States has intervened in MacPherson in support of MacPherson's appellate challenge to this court's conclusion that the ADEA does not apply to the state as an employer. Likewise, the United States has intervened against the Florida Department of Corrections in *Dickson v. Florida Dept. of Corrections*, Eleventh Circuit No. 96-3773. In *Dickson*, the United States takes the same position that plaintiffs take in the instant cases, namely, that the ADA abrogates Eleventh Amendment immunity because Section 5 of the Fourteenth Amendment empowers Congress to enact "appropriate legislation" to "enforce" the Equal Protection Clause.[1]

This court is aware that other judges of this court are presently dealing with the same issue here being addressed. This court is also aware that neither the Eleventh Circuit nor the Supreme Court has ruled on the present question and that other courts are split on the subject, with the majority seeming to favor the position being taken by plaintiffs in the cases at bar and by the United States as intervenor in *Dickson*.

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[1] In *Amos v. Dept. of Public Safety & Corr. Services*, 126 F.3d 589 (4th Cir.1997), the Fourth Circuit recently dealt with a state's Eleventh Amendment immunity under the ADA and held, without addressing whether Congress could have made the ADA applicable to state employees, that Congress did not purport to make the ADA applicable to state prisoners. In this court's opinion, the Fourth Circuit's rationale is inconsistent with the position taken by the United States in *Dickson*.

This court respectfully disagrees with plaintiffs, with the United States in *Dickson*, and with those courts which agree with the United States. Instead, this court thoroughly agrees with the opinion of Judge Graham of the Southern District of Ohio in *Nihiser v. Ohio Environmental Protection Agency*, 979 F.Supp. 1168 (S.D.Ohio 1997). This court need not repeat Judge Graham's rationale except to say that Congress cannot stretch Section 5 and the Equal Protection Clause of the Fourteenth Amendment to force a state to provide allegedly equal treatment by guaranteeing special treatment or "accommodation" for disabled persons, as is purportedly required of states in the two statutes in question. The court in *Nihiser* had available to it not only *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), the case that precipitated the current debate over Eleventh Amendment immunity versus Congressional intent, but also *City of Boerne v. Flores*, ___ U.S. ___, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). Apparently, *Flores* was not available to, was ignored by, or was misunderstood by those courts that have ruled in favor of applying the ADA and/or the Rehab Act to states and that, in the process, have overridden an early, core principle of federalism, which the states deliberately made difficult to override by their ratification of the Eleventh Amendment.

The Commerce Clause provides a legitimate basis for the Congressional enactment of broad remedial legislation applicable to private parties. *See Katzenbach v. McClung*, 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964). However, Congress has pressed to the limit its powers under the Commerce Clause. It was brought up short by Seminole Tribe, where the Supreme Court determined

that Congress stepped over the line. Then, in *Flores*, the Supreme Court made plain that Congress cannot simply contrive, by what might be described as "artful pleading," some justification for its application of a remedial statute to a state when it is obvious that the statute cannot fairly be described as one designed to implement or to "enforce" the Equal Protection Clause or any other guaranty contained in the Constitution that can override the Eleventh Amendment. Under the Commerce Clause, this court would venture to say that Congress probably could succeed in the enactment of legislation that would require private employers to treat literate and illiterate employees alike and/or that would require private employers to treat non-English-speaking and English-speaking employees alike. As recently recognized by the Fourth Circuit in *Brzonkala v. Virginia Polytechnic Institute and State University*, 1997 WL 785529 (4th Cir.), under the teaching of *U.S. v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), the only limitation on Congress under the Commerce Clause is that the regulated activity have a substantial effect on commerce and that Congress have a rational basis for its legislative solution to the perceived problem. If the Fourth Circuit was correct when it determined that the Violence Against Women Act rationally addresses a matter substantially affecting commerce, this court is also correct in assuming that Congress can, pursuant to the Commerce Clause, order private employers not to discriminate against illiterates or against non-English speakers as a matter of regulating commerce. However, this court seriously doubts that Congress could base such an enactment on its power to implement the

Equal Protection Clause and, thus, to override the Eleventh Amendment. Without exploring the debate between those who espouse and those who reject "original intent" as the primary means for deciding matters of constitutional interpretation, it is impossible to present a rational argument, pursuant to the Equal Protection Clause, either for unequal treatment of persons or for taking the concept of equality far beyond the guarantees made when the Equal Protection Clause was written and ratified.

In *Flores*, the United States appeared amicus and contended that, for the purpose of accomplishing the guarantee of the free exercise of religion under the First Amendment, the Religious Freedom Restoration Act ("RFRA") was permissible enforcement legislation under Section 5 of the Fourteenth Amendment. The Supreme Court firmly disagreed with the United States and said, as this court believes the Supreme Court would say in the two cases at bar, that while Congress has considerable latitude in the exercise of its enforcement power under Section 5, it cannot usurp the function of the judiciary, and it cannot engage in constitutional interpretation by the artifice of calling its interpretation "enforcement." As the prior example illustrates, if a court cannot use an "equal protection" argument to justify preferred treatment in the state-run workplace for illiterates or for non-English speakers, who would be exempted from having to read job instructions in English, then Congress cannot require a state to grant such preferential treatment to its employees simply by purporting to invoke Section 5.

The tertiary reliance by plaintiff in CV 97-AR-0092-S on the FMLA implicates the same Congressional reasoning and authority that Congress employed in enacting the

ADA and the Rehab Act, with the same result. Although the FMLA does not refer to Section 5 of the Fourteenth Amendment, it does speak of accomplishing its purpose of promoting family integrity "in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex" and that it will "promote the goal of equal employment opportunity for women and men." 29 U.S.C. § 2601(b)(4) and (5). These statutory expressions are no more than self-serving declarations of the kind criticized in *Flores*. Although they do, perhaps, give the FMLA a better chance at asserting control over the FMLA-proscribed employment practices by states than does similarly self-serving language found in the ADA and the Rehab Act, this court finds this statutory language in the FMLA insufficient to accomplish its purpose.

Separate orders granting defendants' motions for summary judgment will be entered.

(2)

Supreme Court, U.S.
FILED
MAR 1 - 2001
CLERK

No. 99-1240

In the Supreme Court of the United States

UNIVERSITY OF ALABAMA AT BIRMINGHAM, BOARD OF TRUSTEES, ET AL., PETITIONERS

v.

PATRICIA GARRETT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether Titles I and II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12111 to 12117, 12131 to 12165 (1994 & Supp. III 1997), are proper exercises of Congress's power under Section 5 of the Fourteenth Amendment.

2. Whether petitioners are subject to suits under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, either because petitioners waived their Eleventh Amendment immunity when they applied for and accepted federal financial assistance that Congress expressly conditioned upon a waiver of Eleventh Amendment immunity, or because Congress has validly abrogated petitioners' immunity from suits under Section 5 of the Fourteenth Amendment.

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In the Supreme Court of the United States

No. 99-1240

UNIVERSITY OF ALABAMA AT BIRMINGHAM, BOARD OF TRUSTEES, ET AL., PETITIONERS

v.

PATRICIA GARRETT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-48) is reported at 193 F.3d 1214. The opinion of the district court (Pet. App. 49-55) is reported at 989 F. Supp. 1409.

JURISDICTION

The court of appeals entered its judgment on October 26, 1999. The petition for a writ of certiorari was filed on January 24, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Americans with Disabilities Act of 1990 (Disabilities Act), 42 U.S.C. 12101 *et seq.*, is a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42

U.S.C. 12101(b)(1). Based on extensive study and fact-finding by Congress,[1] and Congress's lengthy experience with the analogous nondiscrimination requirement in Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, Congress found in the Disabilities Act that:

> (2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
>
> (3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;
>
> * * * * *
>
> (5) individuals with disabilities continually encounter various forms of discrimination, including

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[1] Fourteen congressional hearings and 63 field hearings by a special congressional task force were held in the three years prior to passage of the Disabilities Act. See S. Rep. No. 116, 101st Cong., 1st Sess. 4-5, 8 (1989); H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 24-28, 31 (1990); *id.* Pt. 3, at 24-25; *id.* Pt. 4, at 28-29; see also Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 393 & nn.1-3 (1991) (listing the individual hearings). Congress also drew upon reports submitted to Congress by the Executive Branch. See S. Rep. No. 116, *supra*, at 6 (citing United States Civil Rights Commission, *Accommodating the Spectrum of Individual Abilities* (1983); National Council on Disability, *Toward Independence* (1986); and National Council on Disability, *On the Threshold of Independence* (1988)); H.R. Rep. No. 485, *supra*, Pt. 2, at 28 (same).

> outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;
>
> (6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally; [and]
>
> (7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

42 U.S.C. 12101(a). Based on those findings, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. 12101(b)(4).

The Disabilities Act targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by em-

ployers; Title II, 42 U.S.C. 12131-12165 (1994 & Supp. III 1997), addresses discrimination by governmental entities; and Title III, 42 U.S.C. 12181-12189 (1994 & Supp. III 1997), addresses discrimination in public accommodations operated by private entities.

This petition involves two suits brought under Titles I and II of the Disabilities Act and Section 504 of the Rehabilitation Act of 1973. Title I provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. 12112(a). A "covered entity" is defined to include any "person engaged in an industry affecting commerce who has 15 or more employees," 42 U.S.C. 12111(2) and (5)(A), and the term "person" incorporates the definition from Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, which includes States. 42 U.S.C. 12111(7); cf. *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 449 & n.2 (1976). The prohibition on discrimination may be enforced through private suits against public entities. See 42 U.S.C. 12117(a) (incorporating the enforcement provisions of Title VII); cf. *Fitzpatrick*, 427 U.S. at 452.

Title II of the Disabilities Act provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" is expressly defined to include "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. 12131(1)(A) and

(B). The prohibition on discrimination may be enforced through private suits against public entities. See 42 U.S.C. 12133; see also *Olmstead* v. *L.C.*, 119 S. Ct. 2176, 2182 (1999).

Congress intended the Disabilities Act to supplement, not supplant, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, which addresses discrimination against persons with disabilities by programs or activities receiving federal financial assistance. See 42 U.S.C. 12201(b) (nothing in the Disabilities Act "shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law * * * that provides greater or equal protection for the rights of individuals with disabilities").[2] Section 504 of the Rehabilitation Act of 1973 provides that "[n]o otherwise qualified individual with a disability in the United States * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance * * * " 29 U.S.C. 794(a). A "program or activity" is expressly defined to include "all of the operations" of "a department, agency, special purpose district, or other instrumentality of a State or local government." 29 U.S.C. 794(b). The prohibition on discrimination may be enforced through private suits against public entities. See 29 U.S.C. 794a(a)(2); cf. *Olmstead*, 119 S. Ct. at 2182 n.4.

In both the Disabilities Act and the Rehabilitation Act, Congress expressly removed the States' Eleventh

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[2] Subsequently, Congress amended its findings underlying the Rehabilitation Act to conform, in large part, to those of the Disabilities Act. See Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, § 101, 106 Stat. 4346 (codified at 29 U.S.C. 701).

Amendment immunity from private suits in federal court. 42 U.S.C. 12202 (a "State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter"); 42 U.S.C. 2000d-7(a)(1) (a "State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973").

2. Respondent Garrett has worked for petitioner University of Alabama since 1977. In August 1994, respondent was diagnosed with breast cancer and underwent a lumpectomy and continued radiation and chemotherapy treatment through January 1995. Respondent's supervisor made negative comments regarding her illness and told her she would be permanently replaced unless she took leave. Partially in response to those actions, and on the advice of her doctor, respondent took four months leave under the Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.* On her return in July 1995, it was initially agreed that respondent would continue in her previous position because she remained able to perform the essential functions of her work. Approximately one week later, however, petitioner demoted her to a position with a significantly lower salary. Pet. App. 9; Garrett Compl. ¶¶ 8-11, 16.

Respondent Ash has worked for petitioner Alabama Department of Youth Services since 1993. He has several impairments, including severe chronic asthma, that substantially limit his ability to breathe. He informed his supervisor of his disability and of his doctor's recommendation that he not be exposed to carbon monoxide or other noxious fumes, such as cigarette

smoke. However, petitioner refused to enforce its previously adopted non-smoking policy and required respondent to drive cars which leaked carbon monoxide fumes into the passenger compartment. After respondent filed a complaint with the Equal Employment Opportunity Commission (EEOC) concerning petitioner's failure to accommodate his respiratory disability, petitioner took adverse employment action against him. Ash Compl. ¶¶ 5-12.

Respondents filed separate suits in the same district court, alleging that petitioners had violated Titles I and II of the Disabilities Act, Section 504 of the Rehabilitation Act, and (for respondent Garrett) the Family and Medical Leave Act. Petitioners filed motions to dismiss on Eleventh Amendment grounds. The district court issued a single opinion dismissing both cases on the ground that none of the statutes validly abrogated petitioners' Eleventh Amendment immunity. Pet. App. 49-55.

3. The United States intervened on appeal, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of Congress's removal of Eleventh Amendment immunity. The court of appeals reversed in pertinent part. Pet. App. 1-49.[3] The Eleventh Circuit had previously upheld the abrogation of immunity in the Disabilities Act, and invalidated the abrogation of immunity in the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.*, in *Kimel* v. *Florida Board of Regents*, 139 F.3d 1426 (11th

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[3] The panel affirmed the district court's judgment that Congress did not validly abrogate the States' Eleventh Amendment immunity in the Family and Medical Leave Act. Pet. App. 8-13. Judge Cook dissented from that aspect of the court's holding. *Id.* at 13-48. Neither the United States nor respondents seek further review of that portion of the court of appeals' judgment.

Cir. 1998), aff'd with respect to the Age Discrimination in Employment Act, 120 S. Ct. 631 (2000), cert. granted with respect to the Disabilties Act *sub nom. Florida Department of Corrections* v. *Dickson*, 120 S. Ct. 976 (2000), cert. dismissed, No. 98-829, 2000 WL 215674 (Feb. 23, 2000). Following its prior ruling in *Kimel*, the court of appeals here upheld the Disabilities Act's abrogation of Eleventh Amendment immunity. Pet. App. 6. The court also held that the analysis adopted in *Kimel* compelled it to uphold the abrogation of Eleventh Amendment immunity for Section 504, as "[t]he statutes serve the same purpose and were born of the same history of discrimination." *Id.* at 7.[4]

ARGUMENT

1. This Court should grant the petition for a writ of certiorari limited to Question 1. On January 21, 2000, this Court granted a writ of certiorari in *Florida Department of Corrections* v. *Dickson*, No. 98-829, to address the validity of the abrogation of the States' Eleventh Amendment immunity to suits under Title I of the Disabilities Act. On January 25, 2000, the Court granted a writ of certiorari in *Alsbrook* v. *Arkansas*, No. 99-423, to address the validity of the abrogation of the States' Eleventh Amendment immunity to suits under Title II of the Disabilities Act. On February 23, 2000, and March 1, 2000, the writs of certiorari in No. 98-829 and No. 99-423, respectively, were dismissed in light of the parties' settlement of the cases.

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[4] Having upheld the Rehabilitation Act's abrogation provision as a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, the court did not address whether the State had waived its Eleventh Amendment immunity by accepting federal funds conditioned on such a waiver.

a. As reflected in this Court's prior grants of writs of certiorari to address the immunity issue in both Title I and Title II earlier this year, the validity of the abrogation for both Titles of the Disabilities Act is ripe for review by this Court because there is an entrenched split in the circuits with respect to both Titles and because the constitutional question presented is of great importance.

Following this Court's decisions in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), and *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), four courts of appeals held that the abrogation of Eleventh Amendment immunity contained in the Disabilities Act is a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment to "enforce" the Equal Protection Clause. See *Amos* v. *Maryland Dep't of Pub. Safety & Correctional Servs.*, 178 F.3d 212 (4th Cir. 1999) (Title II), vacated for reh'g en banc (Dec. 28, 1999), appeal dismissed due to settlement, 2000 WL 248707 (Mar. 6, 2000); *Kimel* v. *Florida Bd. of Regents*, 139 F.3d 1426 (11th Cir. 1998) (Title I), rev'd in part, 120 S. Ct. 631 (2000), cert. granted *sub nom. Florida Dep't of Corrections* v. *Dickson*, 120 S. Ct. 976 (2000), cert. dismissed, No. 98-829, 2000 WL 215674 (Feb. 23, 2000); *Coolbaugh* v. *Louisiana*, 136 F.3d 430 (5th Cir.) (Title II), cert. denied, 119 S. Ct. 58 (1998); *Clark* v. *California*, 123 F.3d 1267 (9th Cir. 1997) (Title II), cert. denied, 524 U.S. 937 (1998); see also *Torres* v. *Puerto Rico Tourism Co.*, 175 F.3d 1, 6 n.7 (1st Cir. 1999) (in Title I case, court states "we have considered the issue of Congress's authority sufficiently to conclude that, were we to confront the question head-on, we almost certainly would join the majority of courts upholding

the provision").[5] The en banc Eighth Circuit invalidated the Disabilities Act's abrogation of Eleventh Amendment immunity in a case arising under Title II of that Act. See *Alsbrook* v. *City of Maumelle*, 184 F.3d 999 (1999), cert. granted in part, 120 S. Ct. 1003 (2000), cert. dismissed, No. 99-423, 2000 WL 230234 (Mar. 1, 2000), and subsequently extended its holding to Title I of the Act, see *DeBose* v. *Nebraska*, 186 F.3d 1087 (1999), petition for cert. pending, No. 99-940.

In addition to the Eleventh Circuit in this case, three other courts of appeals have considered or reconsidered the validity of the Disabilities Act's abrogation after the Eighth Circuit's decisions and this Court's decision last term in *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank*, 119 S. Ct. 2199 (1999), and all have rejected the Eighth Circuit's holding and have upheld the Disabilities Act's abrogation as valid Section 5 legislation. See *Dare* v. *California*, 191 F.3d 1167 (9th Cir. 1999) (Title II), petition for cert. pending, No. 99-1417; *Martin* v. *Kansas*, 190 F.3d 1120 (10th Cir. 1999) (Title I); *Muller* v. *Costello*, 187 F.3d 298 (2d Cir. 1999) (Title I).

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[5] The Seventh Circuit upheld the Disabilities Act's abrogation prior to this Court's decision in *Flores*, *supra*. See *Crawford* v. *Indiana Dep't of Corrections*, 115 F.3d 481, 487 (7th Cir. 1997) (Title II). The continuing vitality of *Crawford* has been challenged in a case arising under Title I, *Erickson* v. *Board of Governors of State Colleges & Universities*, No. 95 C 2541, 1998 WL 748277 (N.D. Ill. Sept. 30, 1998), appeal pending, No. 98-3614 (7th Cir.) (oral argument heard April 27, 1999). The constitutionality of the Disabilities Act's abrogation for both Titles I and II is also pending in a number of cases before the Sixth Circuit, for which a consolidated oral argument was heard on October 24, 1999. See, *e.g.*, *Nihiser* v. *Ohio EPA*, 979 F. Supp. 1168 (S.D. Ohio 1997), appeal pending, No. 97-3933.

Furthermore, after this Court's decision in *Kimel* v. *Florida Board of Regents*, 120 S. Ct. 631 (2000), the Second Circuit again upheld the constitutionality of the Disabilities Act's abrogation in two cases arising under Title I of the Act. See *Kilcullen* v. *New York State Dep't of Labor*, No. 99-7208, 2000 WL 217465 (2d Cir. Feb. 24, 2000); *Jackan* v. *New York State Dep't of Labor*, No. 98-9589, 2000 WL 241648 (2d Cir. Mar. 3, 2000).

The question of Congress's authority to abrogate the States' Eleventh Amendment immunity for Titles I and II of the Disabilities Act has thus been extensively evaluated and considered by the courts of appeals. The conflict is firmly entrenched and incapable of resolution absent intervening action by this Court. As a consequence of the split in the circuits, moreover, the operation of this important civil rights legislation has been significantly impaired in seven States. Unlike litigants in the six circuits where the Disabilities Act's abrogation of Eleventh Amendment immunity has been sustained, persons with disabilities in the Eighth Circuit cannot fully enforce their federal rights under the Disabilities Act in federal court.

b. The present case provides the most appropriate vehicle to address these issues, among the several petitions currently pending before the Court. The case was decided on a motion to dismiss. That clean record permits straightforward and comprehensive consideration of the constitutional questions presented, without simultaneously requiring consideration of the occasionally difficult statutory construction questions posed by the Act. The discrimination, reasonable accommodation, and retaliation claims made by the petitioners, moreover, present a comprehensive overview of both the Act's practical operation and the types of dis-

crimination persons with disabilities encounter in the government workplace. Finally, it contains claims under both Title I and Title II of the Act.[6]

A petition for a writ of certiorari is also pending in *Zimmerman* v. *Oregon Department of Justice*, No. 99-243, which presents the question of the constitutionality of the abrogation for Title II of the Disabilities Act. As we previously stated in our Consolidated Supplemental Brief for the United States at 12, *Florida Dep't of Corrections* v. *Dickson*, No. 98-829, et al. (filed Jan. 13, 2000), *Zimmerman* is a problematic vehicle for a number of reasons. First, the Eleventh Amendment immunity question is a late arrival to the litigation. It was raised for the first time by the plaintiff—not the State—in his petition to this Court. It thus was not addressed by either the district court or the court of appeals. The State, moreover, adopted the assertion of immunity only after this Court called for a response to the petition. The abrogation question thus arises in an extraordinary posture where a State's Eleventh Amendment immunity is presented in the litigation for the first time by a private party who does not believe immunity attaches, and the immunity issue is only belatedly adopted by the State. Cf. *Wisconsin Dep't of Corrections* v. *Schacht*, 524 U.S. 381, 389 (1998) ("The Eleventh Amendment * * * does not automatically destroy original jurisdiction. * * * Unless the State

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[6] For those reasons this case is a better vehicle than *DeBose* v. *Nebraska*, 186 F.3d 1087 (8th Cir. 1999), petition for cert. pending, No. 99-940. *DeBose* presents only a Title I claim. Moreover, *DeBose* arises from a lengthy jury trial, and the content, character, and strength of the evidence presented have never been summarized or reviewed by any of the lower court opinions. Therefore the Court may prefer to hold *DeBose* for a decision in *Garrett*.

raises the matter, a court can ignore it.") (citations omitted); see also *id.* at 393-394 (Kennedy, J., concurring).

Second, *Zimmerman* would require resolution of the additional question whether Title II applies to employment decisions at all, a question on which the circuits are also divided. See *Davoll* v. *Webb*, 194 F.3d 1116, 1130 (10th Cir. 1999) (collecting cases). The cases involved in this petition, by contrast, do not necessitate resolution of that question because Eleventh Amendment immunity was the sole basis for the district court's ruling, it was the only issue pressed by respondents in the court of appeals, and it was the sole ground for the court of appeals' decision. Thus, this Court could affirm or reverse the court of appeals' judgment that the district court had jurisdiction over the Title II claim without deciding whether plaintiffs stated a claim. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) ("the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction"); cf. *Olmstead*, 119 S. Ct. at 2183 (interpreting regulation without addressing its underlying validity or constitutionality). In contrast, the Court would be unable to avoid the issue in *Zimmerman* because the statutory construction issue was the basis for petitioner's loss in the court of appeals and would have to be reversed in order for him to be entitled to further proceedings.[7]

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[7] A petition is also pending in *Brown* v. *North Carolina Division of Motor Vehicles*, No. 99-424. As we explained in our Brief in Opposition in *Brown* (at 9-16), that case raises the quite narrow question of whether a particular Justice Department regulation as applied to an infrequently recurring factual scenario and premised on an unsettled construction of the regulation can be sustained under the Section 5 power. Indeed, a panel of the

2. No further review of the second question presented is warranted. Petitioners correctly note (Pet. 9) that a split exists in the courts of appeals as to whether Congress, pursuant to the Fourteenth Amendment, validly abrogated the States' Eleventh Amendment immunity for claims under Section 504 of the Rehabilitation Act. Compare *Kilcullen* v. *New York State Dep't of Labor*, No. 99-7208, 2000 WL 217465, at *5 (2d Cir. Feb. 24, 2000) (upholding the abrogation for Section 504 as a valid exercise of the Fourteenth Amendment); *Clark* v. *California*, 123 F.3d 1267, 1270 (9th Cir. 1997) (same), cert. denied, 524 U.S. 937 (1998); *Crawford* v. *Indiana Dep't of Corrections*, 115 F.3d 481, 487 (7th Cir. 1997) (same), with *Bradley* v. *Arkansas Dep't of Educ.*, 189 F.3d 745, 755-756 (8th Cir.) (holding that Section 2000d-7 is not a valid abrogation for Section 504), vacated in other part for reh'g en banc *sub. nom. Jim C.* v. *Arkansas Dep't of Educ.*, 197 F.3d 958 (8th Cir. 1999).

This Court need not resolve the question of whether Section 504 reflects a proper exercise of Congress's Section 5 power to abrogate immunity because the removal of immunity must, in any event, be sustained as a congressionally required waiver imposed as a condition upon the receipt of federal financial assistance.[8]

Fourth Circuit, in a now vacated opinion, subsequently upheld the Disabilities Act's abrogation of immunity in another Title II case and limited *Brown* to its facts. See *Amos*, 178 F.3d at 221 n.8. *Brown* thus does not present an appropriate vehicle for consideration of the important constitutional issues raised by this petition. We are serving a copy of this brief on counsel in the *DeBose*, *Zimmerman*, and *Brown* cases.

[8] Petitioner University of Alabama admitted it was a recipient of federal financial assistance. Garrett Compl. ¶ 4; Garrett Ans. ¶ 4. Petitioner Alabama Department of Youth Services has not

Section 504 was modeled on Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, and Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* "Under * * * Title VI, Title IX, and § 504, Congress enters into an arrangement in the nature of a contract with the recipients of the funds: the recipient's acceptance of the funds triggers coverage under the nondiscrimination provision." *United States Dep't of Transp.* v. *Paralyzed Veterans of Am.*, 477 U.S. 597, 605 (1986).

In response to this Court's decision in *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 245-246 (1985), holding that Section 504 was not clear enough to evidence Congress's intent to authorize private damages actions against state entities, Congress enacted 42 U.S.C. 2000d-7 as part of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Tit. X, § 1003, 100 Stat. 1845. Section 2000d-7 provides, in pertinent part:

> A state shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

Before the court of appeals, respondents argued that Section 2000d-7 could be upheld on the ground that

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yet responded to the allegation that it was a recipient of federal financial assistance, Ash Compl. ¶ 4; Ash Ans. ¶ 4.

petitioners had waived their Eleventh Amendment immunity by accepting federal funds after the effective date of Section 2000d-7. See Gov't C.A. Br. 37-38; Appellants Br. 20-21. That position is consistent with this Court's recognition in *Alden* v. *Maine*, 119 S. Ct. 2240 (1999), that "the Federal Government [does not] lack the authority or means to seek the States' voluntary consent to private suits." 119 S. Ct. at 2267 (citing *South Dakota* v. *Dole*, 483 U.S. 203 (1987)). Similarly, in *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 119 S. Ct. 2219 (1999), this Court reaffirmed that Congress can condition the exercise of one of its Article I powers (the approval of interstate compacts) on the States' agreement to waive their Eleventh Amendment immunity from suit. *Id.* at 2231 (reaffirming *Petty* v. *Tennessee Mo. Bridge Comm'n*, 359 U.S. 275 (1959)). The Court also indicated that Congress retained the authority under the Spending Clause to condition the receipt of federal funds on the States' waiver of Eleventh Amendment immunity. 119 S. Ct. at 2231; see also *id.* at 2227 n.2. This Court explained that, unlike Congress's power under the Commerce Clause to regulate "otherwise lawful activity," Congress's power to authorize interstate compacts and spend money was the grant of a "gift" on which Congress could place reasonable conditions that a State was free to accept or reject. *Id.* at 2231.

While the court of appeals here did not address the Spending Clause argument, the Eleventh Circuit has subsequently held that Section 2000d-7's "plain language manifests an unmistakable intent to condition federal funds on a state's waiver of sovereign immunity" and that there is "no constitutional defect inherent in the explicit state immunity waiver enacted

pursuant to the Spending Clause in Section 2000d-7." *Sandoval* v. *Hagan*, 197 F.3d 484, 493, 494 (11th Cir. 1999). This is in accord with almost every other court of appeals that has addressed the issue. See *Litman* v. *George Mason Univ.*, 186 F.3d 544, 553 (4th Cir. 1999), cert. denied, No. 99-596, 2000 WL 198966 (Feb. 22, 2000); *Clark* v. *California*, 123 F.3d 1267, 1271 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998); see also *Little Rock Sch. Dist.* v. *Mauney*, 183 F.3d 816, 831-832 (8th Cir. 1999) (same, for similar language in Individuals with Disabilities Education Act, 20 U.S.C. 1403).[9] On February 22, 2000, this Court denied a petition for a writ of certiorari presenting the question of Congress's authority to effect the waiver in Section 2000d-7 under its Spending Clause power. *George Mason Univ.* v. *Litman*, No. 99-596, 2000 WL 198966 (Feb. 22, 2000). Because the removal of Eleventh Amendment immunity for Section 504 suits can be sustained on this alternative ground for which further review is not warranted, this Court should deny a writ of certiorari on the second question presented.[10]

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[9] A panel of the Eighth Circuit reached the opposite conclusion in *Bradley* v. *Arkansas Department of Education*, 189 F.3d 745, vacated in pertinent part for reh'g en banc *sub nom. Jim C.* v. *Arkansas Dep't of Educ.*, 197 F.3d 958 (1999). The panel opinion was based on the mistaken premise that the State was required either to accept no federal money or to subject all of its programs in every department to Section 504; the opinion was also based on an unduly narrow understanding of Congress's power under the Spending Clause. The Eighth Circuit granted the United States' petition for rehearing en banc to address the Section 504 Spending Clause holding, and oral argument was heard on January 14, 2000.

[10] Respondents' Disabilities Act claims have importance independent of their Rehabilitation Act claims for two reasons. First, the Disabilities Act governs petitioners' conduct regardless of whether they are recipients of federal financial assistance. See n.8,

CONCLUSION

As to the first question presented, regarding the validity of the abrogation of Eleventh Amendment immunity for Titles I and II of the Disabilities Act, the petition for a writ of certiorari should be granted. As to the second question presented, regarding the validity of the removal of Eleventh Amendment immunity for Section 504 of the Rehabilitation Act, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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supra. Second, the standard for awarding damages under the Rehabilitation Act for failure to reasonably accommodate is unsettled, while Title I plainly authorizes compensatory damages for a failure to reasonably accommodate, unless the employer undertakes "good faith efforts" to accommodate, 42 U.S.C. 1981a(a)(3). Thus, regardless of the ultimate disposition of the Rehabilitation Act claims, the parties have a distinct interest in resolving the dispute over the applicability of the Disabilities Act to petitioners' conduct.

Supreme Court, U.S.
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No. 99-1240

IN THE

Supreme Court of the United States

THE UNIVERSITY OF ALABAMA AT BIRMINGHAM, BOARD OF TRUSTEES and THE ALABAMA DEPARTMENT OF YOUTH SERVICES,

Petitioners,

v.

PATRICIA GARRETT and MILTON ASH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM OF RESPONDENTS

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Fourteenth Amendment 6, 8, 9

As will be explained herein, Respondents urge this Court to accept certiorari under Question I of the Petitioners' Petition for Writ of Certiorari. Question I concerns whether a State is entitled to Eleventh Amendment immunity relative to Titles I and II of the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*, (hereinafter the "ADA"). As to Question II, however, 29 U.S.C. § 794 regarding Eleventh Amendment immunity relative to Section 504 of the Rehabilitation Act of 1973 (hereinafter "Section 504") 29 U.S.C. § 794, Respondents urge this Court to deny certiorari. Article I, Section 8 of the Spending Clause provides an independent basis for concluding that a State is not immune from suits brought under Section 504. In fact, Petitioners waived any Eleventh Amendment immunity relative to Section 504 by willingly accepting federal financial assistance.

STATEMENT OF THE CASE

A. Appellant Patricia Garrett.

Ms. Garrett began working with the University of Alabama in Birmingham ("UAB') in 1977. (Garrett R1-1-3; Garrett R1-47-Aff. ¶ 2[1]; Garrett R1-48-15) During her tenure with UAB, Ms. Garrett received several promotions, the latest being in June 1992, to the position of Director of OB/GYN/Neonatal Services. (Garrett R1-1-3) Throughout her fifteen years with UAB, Ms. Garrett never received any written reprimands or other serious discipline. (Garrett R1-47- Aff. ¶ 4)

1. Ms. Garrett's Affidavit was attached to Plaintiff's Opposition to Defendant's Motion to Amend its Motion for Partial Summary Judgment. Consequently, for purposes of clarifying citations to the Record on Appeal and for the convenience of the Court, Respondents have inserted the abbreviation (Aff.) and have further identified the relevant paragraph numbers when referring to Ms. Garrett's Affidavit.

On August 27, 1994, Ms. Garrett was diagnosed with breast cancer. She immediately underwent a lumpectomy, a node removal and a biopsy. (Garrett R1-48-48) Following the surgery, Ms. Garrett also began a regime of radiation treatment, followed by six months of chemotherapy. The chemotherapy lasted through June 1995. (Garrett R1-47- Aff. ¶ 5; Garrett R1-48-49-50) Ms. Garrett alleges that she meets the definition of a person with a disability, as that term is defined under the ADA and Section 504. Even with mitigating measures, Ms. Garrett was substantially limited her ability to, *inter alia*, sleep, care for herself, and work (albeit, as described below, she was able to perform the essential functions of her position with UAB).

In addition, Ms. Garrett has a history of disability and UAB perceived her as disabled. (Garrett R1-1-2; Garrett R1-47- Aff. ¶¶ 7-8; Garrett R2-25) For example, after Ms. Garrett was diagnosed with breast cancer, UAB consistently urged Ms. Garrett to take medical leave, indicating that due to her disability, Ms. Garrett did not look well and needed rest. (Garrett R1-47-Aff. ¶¶ 10, 14-15; Garrett R1-48-154-55, 159-60) UAB management made these remarks despite the fact that Ms. Garrett was fully capable of performing the essential functions of her position. Further, Ms. Garrett actually did continue to perform all of her job duties by taking certain proactive measures such as scheduling her chemotherapy on Friday afternoons in order to avoid disrupting her work schedule. (Garrett R1-47-Aff. ¶ 9) UAB engaged in further discriminatory actions, such as advertising Ms. Garrett's position and locking her out of her computer while she was undergoing radiation treatment and chemotherapy. (Garrett R1-47-Aff. ¶ 13) UAB also repeatedly threatened to transfer Ms. Garrett to a less demanding job, due to the existence of her disabling condition. (Garrett R1-1-4, 5; Garrett R1-47-Aff. ¶ 15; Garrett R1-48-199-201, 205)

Despite UAB's discriminatory conduct, Ms. Garrett continued to perform the essential functions of her position from September 1994 until March 1995. However, after Ms. Garrett's subordinate informed Ms. Garrett that UAB intended to transfer Ms. Garrett to a satellite hospital in a temporary position, and that the subordinate would be replacing her, Ms. Garrett took Family and Medical leave. (Garrett R1-47-Aff. ¶¶ 15-16) The leave was based on Ms. Garrett's physician's recommendation that Ms. Garrett focus on her recovery while undergoing chemotherapy, without the added stress created by UAB's continuous discriminatory acts. (Garrett R1-47-Aff. ¶ 16; Garrett R1-48-204-205, 249)

Upon Ms. Garrett's return from family medical leave, she returned to her previous position where, again, she performed the essential functions of her position. However, approximately one to two weeks after her return, Ms. Garrett's supervisor informed Ms. Garrett that UAB had determined that Ms. Garrett could no longer fill the position of Director of OB/GYN/Neonatal Services. Instead, UAB gave Ms. Garrett the ultimatum of either transferring to an inferior position or termination. (Garrett R1-1-5; Garrett R1-47-Aff. ¶ 17) Ms. Garrett was ultimately offered a position in another department of the University. This transfer represented a demotion and a substantial reduction in pay. (Garrett R1-47-Aff. ¶ 19)

Ms. Garrett's Complaint alleges that UAB's actions constitute, *inter alia*, intentional discrimination and retaliation in violation of the ADA and Section 504.[2] (Garrett R1-1-6) She seeks damages and equitable relief. (Garrett R1-1-8)

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2. Ms. Garrett also alleged a violation of the Family and Medical Leave Act, 29 U.S.C. § 2614 (hereinafter "FMLA"). As will be explained, this issue is not before this Court.

B. Appellant Milton Ash.

Appellant Ash also is a person with a disability, as that term is defined by the ADA and Section 504. Mr. Ash has severe chronic asthma, sleep apnea, obstructive pulmonary disease, and diabetes. Mr. Ash must utilize an inhaler to breathe; and he is required to utilize a respirator and mask, when necessary. (Ash R1-1-2; Ash R1-14-1, ¶¶ 2-5) Even with these measures, Mr. Ash is substantially limited, *inter alia*, in the major life activities of breathing, sleeping, caring for himself, and working (albeit, as described below, he was able to perform the essential functions of his position with ADYS).

Mr. Ash began working with the Alabama Department of Youth Services (hereinafter "ADYS"), as a Security Officer in 1993. (Ash R1-1-3) Mr. Ash performed his job well. (Ash R1-14-Exhs. 5-10, 24) Consequently, in 1996, ADYS promoted Mr. Ash to the classification of Youth Services Security Officer. (Ash R1-14-Exh. 1, ¶ 10) Mr. Ash was qualified to perform the essential functions of this position.

As a Security Officer, Mr. Ash was required to work in a small gate house where he was constantly exposed to intense cigarette fumes. (Ash, R1-14-Exh. 1, ¶¶ 14-15) ADYS has a "No Smoking" policy which, if enforced, would have essentially eliminated the constant presence of cigarette fumes in the gate house. ADYS also required that Mr. Ash drive vehicles which, because they were not regularly maintained, emitted excessive noxious fumes. (Ash R1-1-3; Ash R1-14-Exh. 1, ¶ 12)

Due to Mr. Ash's disability, Mr. Ash and his physicians repeatedly requested that ADYS provide Mr. Ash with reasonable accommodations. (Ash R1-14-Exh. 1, ¶¶ 13-14, 16-17) These reasonable accommodations included asking ADYS to maintain and repair ADYS vehicles so they would not emit toxic fumes, and to enforce its "No Smoking" policy. However, ADYS repeatedly refused to comply with these requests. It failed to enforce its "No Smoking" policy, and it has continued to require Mr. Ash to drive cars which emit carbon monoxide and other noxious fumes. (Ash R1-14-Exh. 1, ¶¶ 16-17, 21; Ash R1-14-Exhs. 12, 17-18, 25, 32) As a result, Mr. Ash was hospitalized for severe asthma attacks. (Ash R1-14-Exh. 1, ¶¶ 18-19; Ash R1-14-Exhs.13, 20)

Mr. Ash was also clearly perceived as disabled when in November 1995, Dr. Booth, Superintendent of Youth Services stated to Mr. Ash, "why don't you just go ahead and quit, . . . just go home and draw disability." (Ash R1-14-Exh. 1, ¶ 20)

Consequently, Mr. Ash filed a timely Charge of Discrimination with the EEOC alleging that ADYS" actions constituted a violation of the ADA and Section 504. (Ash R1-1-4) Subsequent to the filing of his Charge, ADYS has also retaliated against him. (Ash R1-1-5) In his Complaint, Mr. Ash alleges that ADYS engaged in intentional discrimination and retaliation and that it further failed to reasonably accommodate him under the ADA and Section 504. He, too, seeks damages and equitable relief. (Ash R1-1-6, 7)

Prior to the completion of significant discovery, Petitioners filed Motions for Summary Judgment asserting that they were immune under the Eleventh Amendment. The District Court, which coincidentally had both cases, granted Summary Judgment on all counts in a Joint Opinion. Upon appeal, the

Eleventh Circuit Court of Appeals reversed the District's Court's Opinion relative to Section 504 and the ADA. The Court of Appeals held that Section 504 and the ADA constituted a proper exercise of Congressional power under Section 5 of the Fourteenth Amendment and that the State, thus, did not enjoy Eleventh Amendment immunity. The Eleventh Circuit, however, upheld the Court's Opinion relative to the FMLA.[3]

I.

RESPONDENTS URGE THIS COURT TO GRANT CERTIORARI ON QUESTION I OF THE PETITION FOR WRIT OF CERTIORARI WHICH CONCERNS TITLES I AND II OF THE ADA.

This Court's grants of Certiorari in *Dickson*, No. 98-829, and *Alsbrook*, No. 99-423, both of which were settled before oral argument, indicates that this Court wishes to resolve the issue of whether a State enjoys Eleventh Amendment immunity relative to both Titles I and II of the ADA. Indeed, while Petitioners and Respondents take opposing positions with regard to the ultimate answer to this question, Respondents acknowledge that this issue needs resolution to provide guidance to the courts below. This is especially urgent given the split of opinion among the Circuits. As these cases involve both Titles I and II of the ADA, they are especially well situated to allow this Court to review both Titles contemporaneously. They are also well situated as they involve employment issues regarding both intentional discrimination and reasonable accommodation claims under the ADA.

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3. Neither party has sought certiorari on any issue arising under the FMLA.

Additionally, other cases pending before this Court do not present as clear and simple a posture as does *Garrett, et al.* For example, *Zimmerman v. Oregon Department of Justice*, No. 99-243, presents only an issue arising under Title II. Further, the Court of Appeals dismissed the complaint on an issue of statutory construction and not on the basis of Eleventh Amendment immunity. Thus, the Court would have to grant certiorari on both the Eleventh Amendment and statutory issues in order to provide the petitioner any relief. Moreover, the Eleventh Amendment immunity question in the *Zimmerman* case was raised for the first time by the plaintiff in his petition to this Court as a possible defense that the State might assert. The State adopted the assertion of immunity for the first time, only after this Court called for a response to the petition.

Debose v. Nebraska, No. 99-940 also has difficulties not present in *Garrett, et al.*, as it presents a more complicated scenario. *Debose*, which presents only a Title I issue (notwithstanding an apparent typographical error in the opinion), is before this Court after a lengthy jury trial for which the content, quality and strength of the evidence presented has been neither summarized nor reviewed by any lower court. Reviewing a case in this posture allows for the possibility that unknown factual configurations or procedural irregularities in the case may vitiate consideration of the constitutional question.

Finally, *Brown v. North Carolina Division of Motor Vehicles*, No. 99-424, raises a very narrow question regarding the validity of a particular Justice Department regulation which was promulgated solely under Title II, which is both unsettled and unlikely to occur on a frequently repeated basis.

Thus, Respondents urge this Court to accept Question I of Petitioners' Petition, *Garrett, et al.*, which relates to both Titles I and II. Additionally, *Garrett, et al.* does not possess a long and complicated record and it presents factual scenarios involving intentional discriminatory conduct and claims regarding a State's failure to reasonably accommodate a person with a disability.

II.

THIS COURT SHOULD DENY PETITIONERS' PETITION FOR WRIT OF CERTIORARI AS TO QUESTION II. THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO WHETHER A STATE MAY VOLUNTARILY WAIVE ITS ELEVENTH AMENDMENT IMMUNITY UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973 BY RECEIVING FEDERAL FUNDS CONDITIONED UPON SUCH A WAIVER.

A. Congress Unequivocally Expressed That as a Condition of Receiving Federal Funds, A State Must Waive Any Eleventh Amendment Immunity as to Suits under Section 504.

This Court, however, should deny Petitioners' Writ as to Question II. Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, provides a basis for subjecting a State to Section 504 claims which is completely independent from Section 5 of the Fourteenth Amendment.[4] In both enacting

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4. However, if this Court decides to accept certiorari on this issue, Respondents will assert their position that the statute represents a valid abrogation of the states' eleventh immunity pursuant to Section 5 of the Fourteenth Amendment, in addition to Respondents' argument herein. Further, it should be noted that Question II of the (Cont'd)

Section 504, as well as amending the Act in 42 U.S.C. § 2000d-7, Congress relied on the Spending Clause under Article I, Section 8. In so doing, Congress clearly conditioned its provision of federal financial assistance upon a State's express waiver of immunity. 42 U.S.C. § 2000d-7.

Section 504 of the Rehabilitation Act prohibits a recipient of federal financial assistance from discriminating against persons with disabilities.[5] 29 U.S.C. § 794, states:

> No otherwise qualified individual with a disability in the United States, as defined in Section 706(20) of this Title shall, solely by reason of his/her disability, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal financial assistance or any program or activity conducted by any Executive agency, or by the United States Postal Service . . .

(Cont'd)
Petition is inaptly worded, in that it implies that the only basis for finding that a State is subject to suit under Section 504 is through abrogation of a State's immunity under Section 5 of the Fourteenth Amendment. As explained, a separate basis for finding that States do not enjoy immunity relative to a Section 504 claim, is Congress' power under the Spending Clause. Finally, it should be noted that Respondents have repeatedly argued to the courts below that Petitioners waived immunity by accepting funds under Section 504. However, neither Petitioner, nor the courts below, have addressed this argument.

5. The definition of disability is the same under both the ADA and Section 504. Likewise, the standard for determining what constitutes employment discrimination under Section 504 is identical to the standard under Title I of the ADA. 29 U.S.C. § 794(d).

Further, "program or activity" includes:

> a department, agency, special purpose district, or other instrumentality of a State or Local government; or the entity of such State or Local government that distributes such assistance and each department or agency (and each other State or Local government entity, to which the assistance is extended, in the case of assistance to a State or Local government; . . .

Thus, discrimination includes limiting, segregating, or classifying either a job applicant or an employee in a way which adversely affects his or her employment opportunities. It also prohibits a recipient of federal financial assistance from excluding individuals from job opportunities or benefits or from failing to make a reasonable accommodation to the known physical or mental limitations of a qualified individual, unless the entity can demonstrate an undue hardship. 29 U.S.C. § 794.

29 U.S.C. § 794a(a)(2) provides the remedial scheme for a violation of Section 504. Notably, the "remedies, procedures, and rights set forth in Titles VI of the Civil Rights Act of 1964 (42 U.S.C.A. § 2000d, *et seq.*) shall be available" to any person who has experienced discrimination under Section 504. Significantly, 42 U.S.C. 2000d, *et seq.*, also provides the remedial scheme for redressing violations of Title VI and IX.

While it is clear that the mere receipt of federal funds cannot establish that a State has consented to suit in Federal Court, receipt of funds will constitute a waiver of Eleventh Amendment immunity if the statute clearly apprizes the State

of this condition. No State is ever required to accept federal funds. However, Congress is well within its power to condition the receipt of its provision of federal funds upon the recipient's assurance that it will not engage in discriminatory actions towards persons with disabilities. As Petitioners willingly accept federal financial assistance, including assistance that allows them to provide services to persons with disabilities, they must comply with such conditions.[6]

After this Court's decision in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S. Ct. 3142, 87 L. Ed. 2d 171 (1985), Congress amended the Rehabilitation Act, in pertinent part, to state that, "a state shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of Section 504 of the Rehabilitation Act of 1973. . . ." 42 U.S.C. § 2000d-7. This amendment also clarifies that in any suit against the state, all remedies which would be available against any other public or private party, including those at law, are also available against the state. The language of 42 U.S.C. § 2000d-7 demonstrates that Congress unequivocally notified States that they would waive their Eleventh Amendment immunity to Section 504 suits by accepting federal financial assistance.

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6. UAB has acknowledged that it is a recipient of federal financial assistance. Indeed, UAB receives monies to redress issues relative to persons with disabilities by accepting federal funds under the State's Medicaid and Medicare plans. ADYS has not denied its receipt of federal financial assistance. It, too, receives money for educating children with disabilities under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.* and Medicaid.

This Court has already characterized Section 2000d-7 as meeting its requirement that Congress unambiguously express its intent to remove the Eleventh Amendment as a bar to private suits against States in federal court. In *Lane v. Pena*, 518 U.S. 187, 116 S. Ct. 2092, 135 L. Ed. 2d 486 (1996) this Court stated that 2000d-7 constituted an "unambiguous waiver of the State's Eleventh Amendment immunity." *See also Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 112 S. Ct. 102 (1992); *Clark v. California*, 123 F.3d 1267 (9th Cir.), *cert denied*, 524 U.S. 937 (1998). Other Courts of Appeals that have addressed the issue agree that the language of 42 U.S.C. § 2000d-7 is sufficient to put recipients on notice that acceptance of federal funds constitutes a waiver of Eleventh Amendment immunity. *See Sandoval v. Hagen*, 197 F.3d 484 (11th Cir. 1999); *Little Rock Sch. Dist. v. Mauney*, 183 F.3d 816, 831-832 (8th Cir. 1999) (addressing same language in 20 U.S.C. § 1403); *In re Innes*, 184 F.3d 1275, 1282-1283 (10th Cir. 1999) (dictum).

Indeed, one of the purposes of the Eleventh Amendment is to protect the "financial integrity of the States," *Alden v. Maine*, 727 U.S. 706, 119 S. Ct. 2240, 2264, 144 L. Ed. 2d 636 (1999). As such, it is appropriate to permit each State to analyze and decide whether to forego the federal funds, or accept the federal money with the condition that it can be sued in Federal Court. But once that choice is made, "state sovereignty is not violated by requiring the state to honor its obligations pursuant to receipt of those funds." *See New York*, 505 U.S. at 168; *Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 271 (1991). *Bell v. New Jersey*, 461 U.S. 773, 790 (1983).

Significantly, this outcome is not inconsistent with this Court's Decision in *Seminole Tribe* because when Congress enacted legislation under the Spending Clause, it did not abrogate Eleventh Amendment immunity. Rather, it conditioned the receipt of federal funds on a State's voluntary waiver of immunity. Thus, Section 2000d-7 does not represent an abrogation issue, but rather, an express waiver of immunity. Further, Section 2000d-7, embodies exactly the type of unambiguous condition discussed by the Court in *Atascadero*, placing States on express notice that part of the "contract" for receiving federal funds is the requirement that they consent to suit in federal court for alleged violations of Section 504. (*See also Mitten v. Muscogee Co. Sch. Dist.*, 877 F.2d 932 (11th Cir. 1989))

B. No Conflict Exists Among the Circuits.

In addition, there is no conflict among the Circuits with regard to the issue of waiver. The only courts which have even examined this issue relative to Section 504 are the Eighth and Ninth Circuits. In *Clark v. State of California*, 123 F.3d 1267 (9th Cir. 1997), the Ninth Circuit held that the state had unequivocally waived Eleventh Amendment immunity by accepting federal funds pursuant to the Rehabilitation Act, 42 U.S.C. § 2000d-7. Therein the court noted that Section 504 expressly conditions a State's waiver of its Eleventh Amendment immunity by accepting federal financial assistance. Relying on this Court's decision in *Atascadero*, the Ninth Circuit found that Section 504 includes an express statement of intent to condition a State's receipt of federal financial assistance on its express waiver of Eleventh Amendment immunity. Finally, the court took note of this Court's characterization of 42 U.S.C. § 2000(d)-7 as "an unambiguous waiver of the State's Eleventh Amendment immunity." *Lane*, 518 U.S. 187 (1996).

While the Eighth Circuit Court of Appeals in *Bradley v. Arkansas Dept. of Education*, 189 F.3d 745 (8th Cir. 1999), initially held that Section 504 did not constitute a valid exercise of Congress' spending power, the portion of the decision which relates to the spending clause issue was specifically vacated by the Court of Appeals in *Jim C., et al. v. Arkansas Department of Education*, 197 F.3d 958 (8th Cir. December 14, 1999), after granting a petition for a rehearing *en banc* by the United States.

Finally, it should be noted that all the Courts of Appeals that have addressed the issue, both before and after *College Savings Bank v. Florida Post Secondary Education Expense Board*, 119 S. Ct. 2219 (1999), have held that so long as Congress has made its intentions clear, Congress has the power to condition the receipt of federal funds on a State recipient's waiver of Eleventh Amendment immunity.[7] Because the issue of waiver under Section 504 has not been raised by either Petitioner, further review of this issue is not warranted.

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7. *See Litman v. George Mason University*, 186 F.3d 544 (4th Cir. 1999); *Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999) (Title VI of the Civil Rights Act of 1964); *Little Rock Sch. Dist. v. Mauney*, 183 F.3d 816 (8th Cir. 1999); *Department of Educ. v. Katherine D.*, 727 F.2d 809, 818-819 (9th Cir. 1983) (Education for All Handicapped Children Act of 1975), *cert. denied*, 471 U.S. 1117 (1985); *Florida Nursing Home Ass'n v. Page*, 616 F.2d 1355, 1363 (5th Cir. 1980) (Medicaid), *rev'd due to the absence of a clear statement sub nom. Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147 (1981); *Premo v. Martin*, 119 F.3d 764, 770-771 (9th Cir. 1997), *cert. denied*, 522 U.S. 1147 (1998); *Delaware Dep't of Health & Soc. Servs. v. Department of Educ.*, 772 F.2d 1123, 1138 (3rd Cir. 1985).

Finally, it should be noted that just recently, this Court denied certiorari on this issue. *See George Mason University v. Litman*, S. Ct. 2000 WL 198966 (U.S. Feb 22, 2000) (No. 99-596).

CONCLUSION

For each of the reasons stated herein, Respondents urge this Court to grant certiorari on Petitioners' Questions I concerning Titles I and II of the ADA and to deny certiorari with regard to Question II.

Respectfully submitted,

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No. 99-1240

IN THE

Supreme Court of the United States

THE UNIVERSITY OF ALABAMA AT BIRMINGHAM, BOARD OF TRUSTEES, AND THE ALABAMA DEPARTMENT OF YOUTH SERVICES,

Petitioners,

v.

PATRICIA GARRETT AND MILTON ASH,

Respondents.

On Petition For A Writ Of Certiorari To The United States District Court, N.D. Alabama, Southern Division

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONER

Petitioners agree with the United States and the private respondents that the Court should grant question I of the petition, which addresses whether Title I and Title II of the Americans with Disabilities Act (ADA) permissibly abrogate the States' Eleventh Amendment immunity from suit.

In their briefs in opposition, the United States and the private respondents further recommend that the Court deny question II of the petition, which addresses a similar abrogation question with respect to section 504 of the Rehabilitation Act of 1973. While we agree with respondents that it is appropriate for now to restrict review to the ADA question raised in the petition, it seems more appropriate to hold question II of the petition rather than to deny it outright at this point in time. In the eyes of the United States Court of Appeals for the Eleventh Circuit, the same abrogation analysis applies to each federal statute, making it premature to deny question II while question I is being reviewed. At any rate, it is our understanding that limiting the scope of review of a petition operates to hold the remaining questions, not to deny them. *Cf. Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247 n.12 (1981); *see also* Robert L. Stern, et al., *Supreme Court Practice* § 5.10, at 244 (7th ed. 1993).

CONCLUSION

The petition should be granted.

Respectfully submitted,

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No. 99-1240

IN THE
Supreme Court of the United States

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA AND THE ALABAMA DEPARTMENT OF YOUTH SERVICES,

Petitioners,

v.

PATRICIA GARRETT AND MILTON ASH,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

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Petition for Certiorari Filed January 24, 2000
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RELEVANT DOCKET ENTRIES

I. *Ash v. Alabama Department of Youth Services*, United States District Court for the Northern District of Alabama, Southern District, No. CV-97-AR-2179-S

1. 8/22/97 COMPLAINT filed

2. 10/23/97 ANSWER by Alabama Department of Youth Services filed

3. 10/23/97 MOTION (12(b)(6)) by Alabama Department of Youth Services to dismiss filed

4. 11/14/97 ORDER, that defendant Alabama Department of Youth Services' 12(b)(6) motion is converted to a Rule 56 motion filed

5. 12/2/97 MOTION by Alabama Department of Youth Services for summary judgment filed

6. 12/22/97 MOTION by plaintiff Rule 56(f) motion to extend discovery with affidavit of Sandra B. Reiss attached filed

7. 12/22/97 OPPOSITION (Response in) by plaintiff to motion for summary judgment with affidavit of Milton Ash and exhibits attached (1-36) filed

8. 1/6/98 MOTION by Alabama Department of Youth Services to strike affidavit of plaintiff Ash filed

9. 1/13/98 MEMORANDUM opinion filed

10. 1/13/98 ORDER granting defendant's motion for summary judgment to dismiss case with prejudice in conformity with accompanying memorandum opinion the court EXPRESSLY DETERMINES that there exists no genuine issue of material fact and defendant is entitled to judgment as a matter of law; all pending motions are moot; costs taxed against plaintiff filed

11. 1/20/98 NOTICE of appeal by Milton Ash from District Court decision entered 1/13/98; notice of appeal, order appealed from and court copy of docket entries mailed

II. *Garrett v. The Board of Trustees of The University of Alabama in Birmingham*, United States District Court for the Northern District of Alabama, Southern District, No. CV-97-AR-0092-S

1. 1/14/97 COMPLAINT filed

2. 3/14/97 MOTION by UAB Bd of Trustees to dismiss filed

3. 3/14/97 ANSWER by defendant filed

4. 3/25/97 OPPOSITION by plaintiff to defendant's motion to dismiss filed

5. 3/28/97 ORDER granting motion to dismiss as it seeks punitive damages is DISMISSED w/prejudice as set out in this order filed

6. 8/5/97 MOTION by Patricia Garrett to amend complaint filed

7. 8/7/97 18-ORDER granting plaintiff's motion to amend complaint entered

8. 8/7/97 AMENDED complaint filed, by Patricia Garrett; jury demand filed

9. 10/1/97 WITNESS list (expert report) by Patricia Garrett filed

10. 10/2/97 MOTION by UAB Bd of Trustees for partial summary judgment filed

11. 10/6/97 MOTION by UAB Bd of Trustees to exclude expert testimony of Dr. Ted Gansler filed

12. 10/10/97 RESPONSE by Patricia Garrett in opposition to defendant's motion to exclude expert testimony of Dr. Gansler

13. 10/27/97 OPPOSITION by Patricia Garrett to defendant's motion for partial summary judgment filed

14. 11/4/97 MEMORANDUM opinion filed

15. 11/6/97 Report and Recommendation filed regarding motion to exclude expert testimony of Dr. Ted Gansler

16. 11/7/97 ORDER adopting Report and Recommendation of magistrate judge entered 11/6/97 filed

17. 12/9/97 MOTION by UAB Bd of Trustees to amend motion for partial summary judgment filed

18. 12/10/97 ORDER granting defendant's motion to amend motion for partial summary judgment; the court DEEMS defendant's said motion for partial summary judgment as one for complete summary judgment

19. 12/23/97 MOTION by Patricia Garrett to extend discovery filed

20. 12/23/97 OPPOSITION by Patricia Garrett to defendant's motion to amend motion for partial summary judgment filed

21. 12/23/97 DEPOSITION of Patricia Garrett filed

22. 1/5/98 MOTION by UAB Bd of Trustees to strike affidavit of Patricia Garrett filed

23. 1/5/98 RESPONSE by UAB Bd of Trustees to plaintiff's Rule 56(f) motion filed

24. 1/13/98 MEMORANDUM opinion filed

25. 1/13/98 ORDER to dismiss case with prejudice in conformity with accompanying memorandum opinion the court EXPRESSLY DETERMINES that there exists no genuine issue of material fact and that defendant is entitled to judgment as a matter of law; defendant's motion for summary judgment is GRANTED; all other pending motions

		are MOOT; costs taxed against plaintiff filed
26.	1/20/98	NOTICE of appeal by Patricia Garrett from District Court decision entered 1/13/98; notice of appeal, order appealed from and court copy of docket entries mailed

[Filed Aug. 22, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

MILTON ASH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**[CV-97-AR-2179-S]**
ALABAMA DEPARTMENT OF YOUTH SERVICES	)	
	)	
	)	
Defendant.	)	

COMPLAINT

I. INTRODUCTION

This is an action alleging disability discrimination in violation of Titles I, II and IV of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111 et seq., 12131 et seq., and 12203 et seq. and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 et seq. Mr. Milton Ash is a qualified individual with a disability who has been denied accommodations and equal opportunities, benefits and services in his employment and suffered retaliation in response to his requests for accommodations. Plaintiff is entitled to both equitable relief and damages.

II. JURISDICTION

1. This Court has jurisdiction in accordance with 28 U.S.C. § 1331, 28 U.S.C. § 2201, 2202, 29 U.S.C. § 794a, 42 U.S.C. § 12117, and 42 U.S.C. § 12133. Venue is proper pursuant to 28 U.S.C. § 1391.

2. Plaintiff has fulfilled all conditions precedent to the institution of this action under 42 U.S.C. § 12117. Plaintiff timely filed his charge of discrimination within 180 days of the occurrence of the last discriminatory act. Plaintiff also timely filed this Complaint within ninety (90) days of the receipt of a Notice of Right to Sue issued by the EEOC. Title II of the ADA as well as Section 504 of the Rehabilitation Act do not require administrative exhaustion.

III. PARTIES

3. Plaintiff, Milton Ash, is a male citizen of the United States and a resident of the State of Alabama. Mr. Ash is a person with a disability in that he has severe chronic asthma, sleep apnea, obstructive pulmonary disease and diabetes. He currently uses inhalers several times a day and is on a respirator and mask, when necessary. His medications include insulin, Theodur and Prednisone for his respiratory problems. His asthma is severe, chronic and persistent. Plaintiff's conditions substantially limit his ability to, inter alia, sleep, breathe, care for himself and work. Consequently, Plaintiff is a person with a disability in that he has physical impairments which substantially limits one or more of his major life activities. Plaintiff is also perceived as having a disability which substantially limits his ability to work and has a history of having such disabilities. 42 U.S.C. § 12102, 42 U.S.C. § 12131, 29 U.S.C. § 706.

4. Defendant, Alabama Department of Youth Services (hereinafter "DYS"), is an employer pursuant to 42 U.S.C. § 12111(5) and 29 U.S.C. § 2611, and is a public entity in accordance with 42 U.S.C. § 12131. Upon information and belief, Defendant is also a recipient of federal financial assistance.

IV. FACTUAL ALLEGATIONS

5. The Defendant has intentionally, and with malice or reckless indifference, discriminated, on the basis of Plaintiff's

disability, against Plaintiff with respect compensation, job assignments, and other terms, conditions and privileges of employment.

6. Mr. Milton Ash began working as a Security Officer for Defendant in 1993. He immediately informed his employer of his respiratory disabilities and further informed Defendant of his doctor's recommendation that he should not be exposed to carbon monoxide or other noxious fumes, such as cigarette smoke. Specifically, Mr. Ash asked that the vehicles he drove at work be repaired so as not to emit noxious fumes and further requested in writing and by oral request that Defendants enforce the no-smoking policy.

7. Despite Mr. Ash's request for accommodation, Defendants have forced Mr. Ash, as part of his job duties, to drive cars which emit carbon monoxide and other noxious fumes into the passenger compartment. In March 1996, Mr. Ash supplied Defendants with a note from his doctor requesting, once again, that he not be exposed to carbon monoxide or other noxious fumes, as such exposure would exasperate his respiratory problems. Mr. Ash has made repeated requests that Defendants repair these cars. However, Defendants failed to repair the cars and further failed to accommodate Mr. Ash by refusing to change his job duties.

8. Furthermore, Plaintiff has consistently complained to his supervisors that he was exposed to cigarette smoke while at work. Mr. Ash notified his supervisors that such exposure was exasperating his respiratory condition and requested that Defendants enforce the no-smoking policy, specifically in the Gatehouse on the VACCA Campus. However, Defendants took no steps to enforce the no-smoking policy, and continued to allow employees to smoke in the Gatehouse and other areas of Defendants' facility, thus exposing Mr. Ash to dangerous smoke. As such, Mr. Ash's respiratory illness worsened.

9. In July 1996, Mr. Ash was diagnosed with sleep apnea and it was recommended that Plaintiff work daytime shifts to accommodate that condition. Mr. Ash immediately communicated this recommendation to Defendants and requested that he be permitted to work the first shift. Deleon Fancher, Mr. Ash's direct supervisor, informed Plaintiff that he would be transferred to the first shift as soon as Defendants were able to hire two new security police officers. Again, in a letter dated October 16, 1996, Plaintiff's doctor requested that Mr. Ash's schedule be changed to accommodate his disability.

10. Subsequently, Mr. Ash filed a charge of discrimination with the EEOC on July 7, 1996 alleging discrimination on the basis of his disability under the Americans with Disabilities Act for Defendants' failure to accommodate his respiratory disability.

11. After Plaintiff filed his charge of discrimination with the EEOC, Defendants hired two new security officers. However, Defendants refused to transfer Plaintiff to the first shift as promised. Instead, the two new officers were placed on first shift. Other officers without disabilities within DSY were granted their requests to transfer to the first shift during this time period.

12. On September 27, 1996 Plaintiff received a performance evaluation. Although Plaintiff's supervisor was Deleon Fancher, the evaluation was graded by Tom Foster, the business manager, an individual who was not Plaintiff's supervisor and did not work have direct knowledge of his job performance. The evaluation scored Mr. Ash at the "meets standards" category rather than the "exceeds standards" category in which he had previously been scored before filing his charge with the EEOC. Mr. Ash was the only employee in his job category who was evaluated by Mr. Foster rather than Mr. Fancher. Mr. Ash had never received a score of "meets standards" prior to this evaluation, as all of his evaluations were "exceeds standards."

13. On January 28, 1997 Plaintiff filed another charge of discrimination with the EEOC alleging retaliation for asserting his rights under the Americans with Disabilities Act. Specifically, Plaintiff claimed that Defendants retaliated against him for filing his original EEOC charge by refusing to grant his accommodation request for first shift and by lowering his evaluation score.

14. As a result of Defendants' actions, Mr. Ash has suffered extreme harm, including, but not limited to loss of employment opportunities, compensation, and other benefits of employment, deteriorated health, and has suffered pain, humiliation, mental anguish and suffering, and loss of enjoyment of life.

IV. CAUSES OF ACTION — THE AMERICANS WITH DISABILITIES ACT, TITLES I AND II, RETALIATION, THE REHABILITATION ACT OF 1973, SECTION 504

15. Plaintiff realleges and incorporates by reference paragraphs 1 through 11 above with the same force and effect as if fully set out in specific detail hereinbelow.

16. As stated, Plaintiff is a person with a disability, has a history of disability and is perceived as disabled pursuant to 42 U.S.C. § 12102, 29 U.S.C. § 706 and 42 U.S.C. § 12131. Defendant is an employer in accordance with 42 U.S.C. § 12111(5), is a public entity in accordance with 42 U.S.C. § 12131 and, upon information and belief, receives federal financial assistance.

17. Despite Plaintiff's disability, with or without reasonable accommodation, he is able to perform the essential functions of his position as a Security Officer at Alabama Department of Youth Services. Plaintiff meets the definition of a "qualified individual with a disability" pursuant to 42 U.S.C. § 12112, 29 U.S.C. § 794 and 42 U.S.C. § 12132.

18. Defendant has limited, classified, and segregated Plaintiff in a way that adversely affects his job opportunities because of his disability.

19. Further, Defendants have utilized standards or methods of administration that discriminate against Plaintiff on the basis of his disability, and have excluded or otherwise denied Plaintiff equal benefits of his employment because of his disability.

20. Defendants have also failed to accommodate Plaintiff, including, but not limited to, refusing to repair the exhaust leaks in the automobiles, refusing to enforce the no-smoking policy, and refusing to allow him to transfer to the first shift.

21. Defendants retaliated against Mr. Ash by taking adverse employment action against him because he attempted to assert his rights under the Americans with Disabilities Act.

22. Accommodating Mr. Ash by providing an environment free of noxious fumes and moving him to the first shift would not have caused substantial or grievous economic injury to the operations of the Defendant.

VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays that this Court assume jurisdiction of this action and after trial:

1. Issue a declaratory judgment that the employment policies, practices, procedures, conditions and customs of the Defendant, including the action taken against Plaintiff by Defendants are violative of Plaintiff's rights as secured by the Americans with Disabilities Act, Title I, II, and IV, 42 U.S.C. § 12101, et seq., and the Rehabilitation Act of 1973, Section 504, 29 U.S.C. § 794.

2. Grant Plaintiff a permanent injunction enjoining the Defendant, its agents, successors, employees, attorneys and

those acting in concert with the Defendant, and at the Defendant's request, from continuing to violate Plaintiff's rights as well as others who are similarly-situated pursuant to the Americans with Disabilities Act, Titles I, II and IV, and the Rehabilitation Act of 1973, Section 504.

3. Issue a permanent injunction Ordering Defendant to repair the automobiles in its possession that emit carbon-monoxide fumes into the passenger compartments of said vehicles.

4. Issue a permanent injunction Ordering Defendants to enforce its no smoking policy throughout Defendant's place of business.

5. Enter an Order awarding Plaintiff damages including back pay, front pay, nominal, compensatory and punitive damages.

6. Award Plaintiff reasonable costs, attorneys' fees and expenses.

7. Award such other relief and benefits as the cause of justice may require.

Respectfully submitted,

/s/ Kirsten H. Kowalski
Deborah A. Mattison
Kirsten Hunt Kowalski
Sandra B. Reiss
Attorneys for Milton Ash

OF COUNSEL:
GORDON, SILBERMAN, WIGGINS & CHILDS, P.C.
1400 SouthTrust Tower
Birmingham, Alabama 35203
(205) 328-0640

PLAINTIFF DEMANDS A TRIAL BY STRUCK JURY.

/s/ Kirsten H. Kowalski
OF COUNSEL

DEFENDANT'S ADDRESS:

Alabama Department of Youth Services,
Vacca Campus
8950 Roebuck Boulevard
Birmingham, Alabama 35205

[Filed Oct. 23, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

MILTON ASH,	)	
	)	
Plaintiff,	)	
	)	**CIVIL ACTION**
vs.	)	**NUMBER:**
	)	**CV-97-AR-2179-S**
ALABAMA DEPARTMENT	)	
OF YOUTH SERVICES	)	
	)	
Defendant.	)	

ANSWER

Comes now the defendant in the above-styled case, and answers plaintiff's complaint as follows:

A. ANSWER TO ALLEGATIONS OF THE COMPLAINT

Defendant answers the allegations of the complaint in numerical order therein set forth as follows:

I. INTRODUCTION

It is correct that the complaint alleges the violations of Titles I, II, and IV of the Americans with Disabilities ACT (ADA), 42 U.S.C. Section 12111 et. seq. and 12203 et. seq. and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C., Section 794 et. seq. It is also correct that plaintiff specifically alleges that the defendant discriminated against him based on his disabilities and that he suffered retaliation in response to his request for accommodations for his disabilities. It is also

correct that plaintiff seeks both equitable relief and damages. Defendant denies however, that plaintiff is entitled to judgment or to damages or to any relief under any such authority or on any allegation of the complaint.

II. JURISDICTION

1. A. It is correct that this Court has jurisdiction of this matter and pursuant to 28 U.S.C. Section 1331.

   B. 28 U.S.C. Section 2201 is not a jurisdictional statute and does not confer jurisdiction on this Court.

   C. 28 U.S.C. Section 2202 is not a jurisdictional statute and does not confer jurisdiction on this Court.

   D. 29 U.S.C. Section 794(a) is not a jurisdictional statute and does not confer jurisdiction on this Court.

   E. 42 U.S.C. Section 12117 is not a jurisdictional statute and does not confer jurisdiction on this Court.

   F. 42 U.S.C. Section 12133 is not a jurisdictional statute and does not confer jurisdiction on this Court.

   G. Defendant does not contest venue.

2. The allegations of paragraph two are denied.

III. PARTIES

3. Defendant admits that Milton Ash is a male citizen of the United States and a resident of the State of Alabama, but deny all other allegations of paragraph three.

4. Defendant admits that the Alabama Department of Youth Services is an employer pursuant to 42 U.S.C. Section 12111(5) and 29 U.S.C. Section 2611, and is a public entity in accordance with 42 U.S.C. Section 12131.

IV. FACTUAL ALLEGATIONS

5. The allegations of paragraph five are denied.

6. The allegation of the first sentence of paragraph six is admitted. All other allegations of paragraph six are denied.

7. The allegations of paragraph seven are denied.

8. The allegations of paragraph eight are denied.

9. The allegations of paragraph nine are denied.

10. The defendant admits that plaintiff filed a charge of discrimination with EEOC on the basis of his alleged disability under the ADA.

11. Defendant is without sufficient information to form a belief as to the truth of the allegations contained therein, and thus denies the same.

12. Defendant is without sufficient information to form a belief as to the truth of the allegations contained therein, and thus denies the same.

13. Defendant admits that on January 28, 1997, plaintiff filed a charge of discrimination with the EEOC alleging retaliation for asserting his rights under the ADA Act.

14. The allegations of paragraph fourteen are denied.

IV. CAUSES OF ACTION - THE AMERICANS WITH DISABILITIES ACT, TITLES I AND II, RETALIATION, THE REHABILITATION ACT OF 1973, SECTION 504.

15. In response to paragraph fifteen of the complaint, the defendant adopts, re-avers, and incorporates herein by reference each and all of its responses to paragraph one through fourteen of the complaint.

16. The allegations of paragraph sixteen are denied.

17. The allegations of paragraph seventeen are denied.

18. The allegations of paragraph eighteen are denied.

19. The allegations of paragraph nineteen are denied.

20. The allegations of paragraph twenty are denied.

21. The allegations of paragraph twenty one are denied.

22. The allegations of paragraph twenty two are denied.

VI. PRAYER FOR RELIEF

1. Defendant denies that plaintiff is entitled to any declaratory or injunctive relief, or damages or to any relief under the Americans with Disabilities Act, Title I. and II., Retaliation, The Rehabilitation Act of 1973, Section 504.

AS TO ALL COUNTS

2. Defendant denies that plaintiff is entitled to attorneys' fees or costs or any other equitable or legal relief.

B. ADDITIONAL ANSWER TO THE COMPLAINT

For further answer to the complaint, defendant says as follows, separately and severally:

FIRST AFFIMATIVE DEFENSE

The complaint is not maintainable under Title I and II of the ADA unless and until the plaintiff establishes satisfaction of the prerequisites to the institution and maintenance of an action under each such statutes as to the defendant.

SECOND AFFIRMATIVE DEFENSE

The complaint is not maintainable under Title I and II of the ADA with respect to any event or alleged event occurring more than 180 days prior to the filing of the Equal Employment Opportunity Commission charge or charges on which the complaint is based.

THIRD AFFIRMATIVE DEFENSE

Any and all claims and allegations not asserted by and encompassed within a timely filed EEOC charge by the plaintiff are not maintainable under Title I and II or the ADA.

FOURTH AFFIRMATIVE DEFENSE

The plaintiff has failed to exhaust his administrative remedies under Title I and II of the ADA.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff is not entitled to damages under Section 102(b)(5) of the ADA because defendant has demonstrated the required good faith efforts to reasonably accommodate the plaintiff's alleged disability.

SIXTH AFFIRMATIVE DEFENSE

Any and all actions taken by defendant with regard to plaintiff were taken pursuant to legitimate non-discriminatory reasons.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff is not entitled to punitive damages against defendants.

EIGHTH AFFIRMATIVE DEFENSE

The requirement of working on all shifts is a bona fide occupational qualification.

NINTH AFFIRMATIVE DEFENSE

The challenged action described in plaintiff's complaint would have been taken by defendant, even in the absence of any alleged discriminatory intent.

TENTH AFFIRMATIVE DEFENSE

Plaintiff's complaint fails to state a claim upon which relief can be granted.

ELEVENTH AFFIRMATIVE DEFENSE

All requirements and qualifications for the job classification held by plaintiff are job related and consistent with business necessity.

TWELTH AFFIRMATIVE DEFENSE

The plaintiff is not a qualified individual under the ADA.

THIRTEENTH AFFIRMATIVE DEFENSE

The plaintiff cannot be accommodated under the ADA.

FOURTEENTH AFFIRMATIVE DEFENSE

The plaintiff is not an individual with a disability as defined under the ADA.

This answer is respectfully submitted this the 22nd day of October, 1997.

/s/ William J. Samford, II
William J. Samford, II
General Counsel

OF COUNSEL:
Alabama Department of Youth Services
Post Office Box 66
Mt. Meigs, Alabama 36057-0066
Phone: (334) 215-3804
Fax: 215-1453

[Filed Jan. 14, 1997]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

PATRICIA GARRETT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CIVIL ACTION**
	)	**NUMBER:**
THE BOARD OF TRUSTEES	)	**[CV-97-AR-0092-S]**
OF THE UNIVERSITY OF	)	
ALABAMA IN BIRMING-	)	
HAM,	)	
Defendant.	)	

COMPLAINT

I. INTRODUCTION

This complaint alleges violations of the Americans with Disabilities Act ("ADA"), Titles I and II, the Rehabilitation Act of 1973, Section 504, and the Family Medical Leave Act ("FMLA"). Plaintiff alleges that Defendant discriminated against her based on her disability and in failing to restore her to her prior position or to a similar position upon her return to work from family medical leave. This action seeks both equitable relief and damages.

II. JURISDICTION

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 2201 and 2202, 42 U.S.C. § 2000e *et seq.*, 29 U.S.C. § 794 *et seq.*, 42 U.S.C. § 12117, 42 U.S.C. §§ 12133, and 29 U.S.C. § 2617. Venue is proper pursuant to 28 U.S.C. § 1391.

2. Plaintiff has fulfilled all conditions precedent to the institution of this action under 42 U.S.C. § 12117 and Title VII of the "Civil Rights Act of 1964", as amended, 42 U.S.C. § 2000e *et seq.*, and as amended by the "Civil Rights Act of 1991", 42 U.S.C. § 1981a. Plaintiff timely filed her charge of discrimination within 180 days of occurrence of the last discriminatory act. Plaintiff also timely filed this Complaint within ninety (90) days of the receipt of a Notice of Right to Sue issued by the EEOC and the Department of Justice. Title II of the ADA as well as Section 504 of the Rehabilitation Act and the Family Medical Leave Act do not require administrative exhaustion.

III. PARTIES

3. Plaintiff, Patricia Garrett, is a female citizen of the United States and a resident of the State of Alabama. On August 27, 1994, Ms. Garrett was diagnosed with breast cancer. Within the week, Ms. Garrett began treatment for the disease, undergoing a lumpectomy followed by radiation and chemotherapy which lasted through June 1995. Plaintiff's condition substantially limits her ability to, *inter alia*, sleep, care for herself and work. Consequently, Plaintiff is a person with a disability in that she has a physical impairment which substantially limits one or more of her major life activities. Plaintiff is also perceived as having a disability which substantially limits her ability to work and has a history of such disability. 42 U.S.C. § 12102, 42 U.S.C. § 12131, 29 U.S.C. § 706. Ms. Garrett has a serious health condition and has been employed with defendant for at least twelve months and had requested authorized leave in compliance with the certification requirements of her employer. Consequently, she is an eligible employee, as defined by the Family Medical Leave Act.

4. Defendant, The Board of Trustees of the University of Alabama in Birmingham (hereinafter "UAB Hospital") is an employer pursuant to 42 U.S.C. § 12111(5) and 29 U.S.C. § 2611, and is a public entity in accordance with 42 U.S.C.

§ 12131. Defendant is also a recipient of federal financial assistance.

IV. FACTUAL ALLEGATIONS

5. The Defendant has intentionally, and with malice or reckless indifference discriminated, on the basis of Plaintiff's disability, against Plaintiff with respect to discharge, medical leave, compensation, job assignments, and other terms, conditions and privileges of employment.

6. Ms. Garrett was hired by defendant in 1977 as a Registered Nurse. In 1986, Ms. Garrett began working in the emergency room while working on her Masters in Nursing. As a result of her advanced education and good job performance, Ms. Garrett began to receive administrative promotions, and in June 1992, Ms. Garrett was awarded the position of Director of OB/Gyn/Neonatal Services which included managing Cooper Green's Perinatal Division.

7. On September 5, 1994, Ms. Garrett was diagnosed with breast cancer. Within a week Ms. Garrett underwent a lumpectomy and in October 1994 began radiation treatment, followed by chemotherapy in January 1995.

8. During the radiation treatment for her disability, Ms. Garrett preferred to work full-time and retain all her normal duties. She communicated this preference verbally and in writing to her supervisor, Sabrina Shannon. However, throughout the fall of 1994, Ms. Shannon, consistently encouraged Ms. Garrett to take leave due to plaintiff's medical condition, and Ms. Garrett became fearful about her job security as she had heard that Ms. Shannon tended to get rid of employees with "flaws". In fact, on the agenda memo dated January 5, 1995, Ms. Garrett's position was listed as "being recruited"; however, she was later told by Ms. Shannon that this was a typographical error.

9. In January 1995, Ms. Garrett began undergoing chemotherapy. During this time, Ms. Garrett applied for intermittent leave under the FMLA. Also during the winter of 1994/1995, Ms. Shannon repeatedly threatened to transfer to Ms. Garrett to a less demanding position due to plaintiff's medical condition, despite Ms. Garrett's verbal and written statements that she was able to perform her position with or without reasonable accommodation.

10. In March 1995, after a number of negative comments regarding her illness by Ms. Shannon and the affects these comments and her illness had on her, Ms. Garrett took the Family Medical Leave offered by defendant for the remainder of her chemotherapy. Ms. Garrett took Family Medical Leave from approximately March 1, 1995 - July 10, 1995, the four months guaranteed by defendant's employee handbook and Family Medical Leave materials.

11. Upon her return from Family Medical Leave, Ms. Garrett met with Ms. Shannon and Anne Ward from UAB personnel. At that meeting, it was decided that Ms. Garrett would continue in her position as Director of OB/Gyn/Neonatal Services. However, approximately a week later, Ms. Shannon told Ms. Garrett that she would either have to quit or transfer to another position, despite that there were no other comparable positions in status or pay or else.

12. Facing termination, Ms. Garrett was forced to apply for a transfer although she desired to retain her prior position. Ms. Garrett was ultimately transferred to the position of Nurse Manager at the Mary Lewis Convalescence Home, a position which was a lower position and approximately a $13,000.00 decrease in salary.

13. As a result of Defendant's action, Ms. Garrett has suffered extreme harm, including, but not limited to, loss of employment opportunities, denial of wages, compensation and other benefits and conditions of employment. Additionally, Ms.

Garrett has suffered injury including pain, humiliation, mental anguish and suffering, and loss of enjoyment of life.

IV. CAUSES OF ACTION - THE AMERICANS WITH DISABILITIES ACT, TITLES I AND II, RETALIATION, THE REHABILITATION ACT OF 1973, SECTION 504

14. Plaintiff realleges and incorporates by reference paragraphs 1 through 13 above with the same force and effect as if fully set out in specific detail hereinbelow.

15. As stated, Plaintiff is a person with a disability, has a history of disability and is perceived as disabled pursuant to 42 U.S.C. § 12102, 29 U.S.C. § 706 and 42 U.S.C. § 12131. Defendant is an employer in accordance with 42 U.S.C. § 12111(5), is a public entity in accordance with 42 U.S.C. § 12131 and receives federal financial assistance.

16. Despite Plaintiff's disability, with or without reasonable accommodation, she is able to perform the essential functions of her position as Director of OB/Gyn/Neonatal Services, as well as several other positions within UAB Hospital. Plaintiff meets the definition of "a qualified individual with a disability" pursuant to 42 U.S.C. § 12111(8), 29. U.S.C. § 794 and 42 U.S.C. § 12131.

17. Defendant, by its actions, has intentionally, maliciously and with reckless indifference discriminated against Ms. Garrett because of her disability with regard to her termination/demotion, employee compensation, benefits, and other terms and conditions of employment. 42 U.S.C. § 12112, 29 U.S.C. § 794 and 42 U.S.C. § 12132.

18. Defendant has limited and classified Ms. Garrett in a manner which adversely affects her opportunities, income and status because of her disability.

19. Furthermore, Defendant has failed to accommodate Ms. Garrett, including allowing her to return to work, work with

intermittent leave or transferring her to a comparable position in both salary and status.

20. Restoring Ms. Garrett to her former position or an equivalent job would not have caused substantial or grievous economic injury to the operations of the Defendant.

V. THE FAMILY MEDICAL LEAVE ACT

21. Plaintiff realleges and incorporates by reference paragraphs 1-20 above with the same force and effect as if fully set out in specific detail hereinbelow.

22. As stated, plaintiff is a person with a disability and serious health condition pursuant to 29 U.S.C. § 2611. Ms. Garrett had been employed with defendants for at least 12 months and requested authorized leave in compliance with 29 U.S.C. § 2613 and the certification requirements of her employer. Defendant is an employer in accordance with 42 U.S.C. § 2611.

23. Defendant violated the Family Medical Leave Act, 29 U.S.C. § 2614, *inter alia*, with regards to restoring plaintiff to the position she held before she requested authorized leave, or an equivalent position with equivalent employment benefits, pay and other terms and conditions of employment.

24. Defendant intentionally, maliciously and with reckless indifference denied Ms. Garrett restoration to the position she occupied before she requested authorized leave under the Family Medical Leave Act.

25. Restoring Ms. Garrett to her former position or an equivalent job would not have caused substantial or grievous economic injury to the operations of the defendant.

VI. PRAYER FOR RELIEF

WHEREFORE, the Plaintiff respectfully prays that this Court assume jurisdiction of this action and after trial:

1. Issue a declaratory judgment that the employment policies, practices, procedures, conditions and customs of the defendant including the action taken against plaintiff by defendant are violative of Plaintiff's rights as secured by the Americans with Disabilities Act, Title I and II, 42 U.S.C. § 12101, *et seq*., the Rehabilitation Act of 1973, Section 504, 29 U.S.C. § 794 and the Family Medical Leave Act, 29 U.S.C. § 2611 *et seq*.

2. Grant Plaintiff a permanent injunction enjoining the Defendant, its agents, successors, employees, attorneys and those acting in concert with the Defendant, and at the Defendant's request, from continuing to violate Plaintiff's rights as well as others who are similarly-situated pursuant to the Americans with Disabilities Act, Titles I and II, the Rehabilitation Act of 1973, Section 504 and the Family Medical Leave Act, 29 U.S.C. § 2611 *et seq*.

3. Enter an Order awarding the Plaintiff damages including backpay, frontpay, nominal, liquidated, compensatory and punitive damages.

4. Award Plaintiff reasonable costs, attorney's fees and expenses.

5. Award such other relief and benefits as the cause of justice may require.

Respectfully submitted,

/s/ Sandra B. Reiss

RICHARD EBBINGHOUSE
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PLAINTIFF DEMANDS A TRIAL BY STRUCK JURY.

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[Filed Mar. 14, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

PATRICIA GARRETT,	)
	)
Plaintiff,	)
	)
vs.	)
CASE NO.	)
CV 97-AR-0092-S	
THE BOARD OF	)
TRUSTEES OF THE	)
UNIVERSITY OF	)
ALABAMA IN	)
BIRMINGHAM,	)
	)
Defendant.	)

ANSWER

COMES now the Board of Trustees of the University of Alabama ("Board"), for its division, The University of Alabama at Birmingham, and answers the plaintiff's complaint as follows:

FIRST DEFENSE

The Board responds to the several allegations of the plaintiff's complaint in the order they are alleged:

a. The Board admits jurisdiction and venue are proper in this court, but denies that there is any substantive basis for the claims presented in this case.

a. Admitted.

a. The Board admits the first two sentences of paragraph three. The Board has insufficient knowledge to either admit or deny the allegations of the third sentence. The allegations for the fourth, fifth and sixth sentences are denied. The last two sentences of paragraph three are admitted. The Board adds that the plaintiff has been granted any leave that she requested, under the Family Medical Leave Act ("FMLA") or otherwise.

a. Admitted.

a. Denied.

a. Admitted with the exception that the correct title of plaintiff's position was Director of Nursing, OB/GYN/Neonatal Services.

a. Upon information and belief, the Board admits that the plaintiff was diagnosed with breast cancer in or around the first part of September, 1994. However, the Board has insufficient knowledge to either admit or deny the remaining allegations of paragraph seven.

a. Denied.

a. The Board admits the first two sentences of paragraph nine, and adds that plaintiff was granted all leave that she requested, even without significant advance notice, for purposes of her chemotherapy and/or radiation treatments. The remaining allegations of paragraph nine are denied.

a. The first sentence of paragraph ten is denied. The second sentence of paragraph ten is admitted.

a. The first two sentences of paragraph eleven are admitted. The remaining allegations of paragraph eleven are denied.

a. The first sentence of paragraph twelve is denied. In response to the second sentence of this paragraph, the Board

states that plaintiff applied for a transfer to the stated position, and said transfer was not suggested to or forced upon the plaintiff by any employee of the Board or any of her supervisors.

a. Denied.

a. The Board realleges and incorporates by reference its response to paragraphs 1-13 above as if fully set forth herein.

a. The first sentence of paragraph fifteen is denied. The second sentence of paragraph fifteen is admitted.

a. The first sentence of paragraph sixteen is admitted, with the exception that the Board avers that plaintiff is not disabled as that term is defined within the Americans with Disabilities Act and the other statutes cited in plaintiff's complaint. The second sentence of paragraph sixteen is denied.

a. Denied.

a. Denied.

a. Denied. The Board adds that the plaintiff has never requested any accommodation from the defendant.

a. The Board admits the allegations of paragraph twenty but adds that the plaintiff has never requested that she be returned to her former position.

a. The Board realleges and incorporates by reference herein its responses to paragraphs 1-20 above, as if fully set forth herein.

a. The first sentence of paragraph twenty-two is denied. The second and third sentences of paragraph twenty-two are admitted.

a. Denied.

a. Denied.

a. The Board admits the allegations of paragraph twenty but adds that the plaintiff has never requested that she be returned to her former position.

In response to plaintiff's prayer for relief, the Board denies that the plaintiff is entitled to any of the relief requested.

SECOND DEFENSE

The plaintiff is not an individual with a disability, nor has she been regarded or perceived as an individual with a disability.

THIRD DEFENSE

The plaintiff voluntarily quit the position she held and applied for a transfer to another position, which transfer she was given by her employer. She has not suffered any adverse employment action against her by her employer.

FOURTH DEFENSE

After being granted leave as she requested under the Family Medical Leave Act, the plaintiff was returned to full duty in the same position she had held prior to taking the leave. This defendant has not violated the FMLA.

FIFTH DEFENSE

The plaintiff did not request any reasonable accommodation from her supervisor other than her FMLA leave, which was granted.

SIXTH DEFENSE

The plaintiff is not entitled to front pay.

SEVENTH DEFENSE

The plaintiff is not entitled to recover punitive damages against the Board.

EIGHTH DEFENSE

All actions taken by the defendant with regard to the plaintiff were based on legitimate, non-discriminatory reasons.

NINTH DEFENSE

To the extent that plaintiff purports to make a claim of unlawful retaliation under Title VII, defendant avers that plaintiff has not alleged, nor has she engaged in, any protected activity under any statute.

TENTH DEFENSE

The defendant made good faith efforts in consultation with the plaintiff to make reasonable accommodation and is therefore not liable for damages, pursuant to 42 U.S.C. § 1981a(a)(3).

ELEVENTH DEFENSE

Pending further discovery on the nature of plaintiff's claim, defendant reserves the right to plead the defense of undue hardship.

TWELFTH DEFENSE

Pending further discovery on the nature of plaintiff's claims, defendant reserves the right to plead the defense that plaintiff's requested accommodation would fundamentally alter the nature of the public service or program of the defendant.

THIRTEENTH DEFENSE

Plaintiff has failed to mitigate her damages.

FOURTEENTH DEFENSE

Any claim arising out of acts occurring prior to July 23, 1995 is barred insofar as it is brought pursuant to the ADA for plaintiff's failure to timely file a charge with the EEOC.

FIFTEENTH DEFENSE

Any claim arising out of acts occurring prior to January 13, 1995 is barred by the statute of limitations.

SIXTEENTH DEFENSE

Plaintiff is not entitled to liquidated damages on her claim under the FMLA as the defendant acted in good faith at all times.

/s/ Gary C. Smith
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/s/ Lisa Huggins
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[Filed Aug. 7, 1997]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

PATRICIA GARRETT,	)	
	)	
Plaintiff,	)	
	)	**CV-97-AR-0092-S**
v.	)	
	)	
THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA IN BIRMINGHAM,	)	
	)	
Defendant.	)	

AMENDED COMPLAINT

I. INTRODUCTION

This complaint alleges violations of the Americans with Disabilities Act ("ADA"), Titles I, II and IV, the Rehabilitation Act of 1973, Section 504, and the Family Medical Leave Act ("FMLA"). Plaintiff alleges that Defendant discriminated and retaliated against her based on her disability and in failing to restore her to her prior position or to a similar position upon her return to work from family medical leave. This action seeks both equitable relief and damages.

II. JURISDICTION

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 2201 and 2202, 42 U.S.C. § 2000e *et seq.*, 29 U.S.C. § 794 et seq., 42 U.S.C. § 12117, 42 U.S.C.

§§ 12133, and 42 U.S.C. § 12203. Venue is proper pursuant to 28 U.S.C. § 1391.

2. Plaintiff has fulfilled all conditions precedent to the institution of this action under 42 U.S.C. § 12117 and 12203 and Title VII of the "Civil Rights Act of 1964", as amended, 42 U.S.C. § 2000e et seq., and as amended by the "Civil Rights Act of 1991", 42 U.S.C. § 1981a. Plaintiff timely filed her charge of discrimination within 180 days of occurrence of the last discriminatory act. Plaintiff also timely filed this Complaint within ninety (90) days of the receipt of a Notice of Right to Sue issued by the EEOC and the Department of Justice. Title II of the ADA as well as Section 504 of the Rehabilitation Act and the Family Medical Leave Act do not require administrative exhaustion.

III. PARTIES

3. Plaintiff, Patricia Garrett, is a female citizen of the United States and a resident of the State of Alabama. On August 27, 1994, Ms. Garrett was diagnosed with breast cancer. Within the week, Ms. Garrett began treatment for the disease, undergoing a lumpectomy followed by radiation and chemotherapy which lasted through June 1995. Plaintiff's condition substantially limits her ability to, inter alia, sleep, care for herself and work. Consequently, Plaintiff is a person with a disability in that she has a physical impairment which substantially limits one or more of her major life activities. Plaintiff is also perceived as having a disability which substantially limits her ability to work and has a history of such disability. 42 U.S.C. § 12102, 42 U.S.C. § 12131, 29 U.S.C. § 706. Ms. Garrett has a serious health condition and has been employed with defendant for at least twelve months and had requested authorized leave in compliance with the certification requirements of her employer. Consequently, she is an eligible employee, as defined by the Family Medical Leave Act.

4. Defendant, The Board of Trustees of the University of Alabama in Birmingham (hereinafter "UAB Hospital") is an employer pursuant to 42 U.S.C. § 12111(5) and 29 U.S.C. § 2611, and is a public entity in accordance with 42 U.S.C. § 12131. Defendant is also a recipient of federal financial assistance.

IV. FACTUAL ALLEGATIONS

5. The Defendant has intentionally, and with malice or reckless indifference discriminated and retaliated, on the basis of Plaintiff's disability, against Plaintiff with respect to discharge, medical leave, compensation, job assignments, and other terms, conditions and privileges of employment.

6. Ms. Garrett was hired by defendant in 1977 as a Registered Nurse. In 1986, Ms. Garrett began working in the emergency room while working on her Masters in Nursing. As a result of her advanced education and good job performance, Ms. Garrett began to receive administrative promotions, and in June 1992, Ms. Garrett was awarded the position of Director of OB/Gyn/Neonatal Services which included managing Cooper Green's Perinatal Division.

7. On September 5, 1994, Ms. Garrett was diagnosed with breast cancer. Within a week Ms. Garrett underwent a lumpectomy and in October 1994 began radiation treatment, followed by chemotherapy in January 1995.

8. During the radiation treatment for her disability, Ms. Garrett preferred to work full-time and retain all her normal duties. She communicated this preference verbally, and in writing, to her supervisor, Sabrina Shannon. However, throughout the fall of 1994, Ms. Shannon, consistently encouraged Ms. Garrett to take leave due to plaintiff's medical condition, and Ms. Garrett became fearful about her job security as she had heard that Ms. Shannon tended to get rid of employees with "flaws". In fact, on the agenda memo dated January 5, 1995, Ms. Garrett's position was listed as "being

recruited"; however, she was later told by Ms. Shannon that this was a typographical error.

9. In January 1995, Ms. Garrett began undergoing chemotherapy. During this time, Ms. Garrett applied for intermittent leave under the FMLA. Also during the winter of 1994/1995, Ms. Shannon repeatedly threatened to transfer to Ms. Garrett to a less demanding position due to plaintiff's medical condition, despite Ms. Garrett's verbal and written statements that she was able to perform her position with or without reasonable accommodation.

10. In March 1995, after a number of negative comments regarding her illness by Ms. Shannon and the affects these comments and her illness had on her, Ms. Garrett took the Family Medical Leave offered by defendant for the remainder of her chemotherapy. Ms. Garrett took Family Medical Leave from approximately March 1, 1995 - July 10, 1995, the four months guaranteed by defendant's employee handbook and Family Medical Leave materials.

11. Upon her return from family medical leave, Ms. Garrett met with Ms. Shannon and Anne Ward from UAB personnel. At that meeting, it was decided that Ms. Garrett would continue in her position as Director of OB/Gyn/Neonatal Services. However, approximately a week later, Ms. Shannon told Ms. Garrett that she would either have to quit or transfer to another position, despite the fact that there were no other comparable positions in status or pay or else.

12. Facing termination, Ms. Garrett was forced to apply for a transfer although she desired to retain her prior position. Ms. Garrett was ultimately transferred to the position of Nurse Manager at the Mary Lewis Convalescence Home, a position which was a lower position and approximately a $13,000.00 decrease in salary.

13. Ms. Garrett was terminated as a result of her disability, and in retaliation for requesting and utilizing accommodations afforded by the ADA and Rehabilitation Act.

14. As a result of Defendant's action, Ms. Garrett has suffered extreme harm, including, but not limited to, loss of employment opportunities, denial of wages, compensation and other benefits and conditions of employment. Additionally, Ms. Garrett has suffered injury including pain, humiliation, mental anguish and suffering, and loss of enjoyment of life.

V. CAUSES OF ACTION - THE AMERICANS WITH DISABILITIES ACT, TITLES I, II AND IV, (RETALIATION), THE REHABILITATION ACT OF 1973, SECTION 504.

15. Plaintiff realleges and incorporates by reference paragraphs 1 through 14 above with the same force and effect as if fully set out in specific detail hereinbelow.

16. As stated, Plaintiff is a person with a disability, has a history of disability and is perceived as disabled pursuant to 42 U.S.C. § 12102, 12131 and 12203 and 29 U.S.C. § 706. Defendant is an employer in accordance with 42 U.S.C. § 12111(5), is a public entity in accordance with 42 U.S.C. § 12131 and receives federal financial assistance.

17. Despite Plaintiff's disability, with or without reasonable accommodation, she is able to perform the essential functions of her position as Director of OB/Gyn/Neonatal Services, as well as several other positions within UAB Hospital. Plaintiff meets the definition of "a qualified individual with a disability" pursuant to 42 U.S.C. § 12111(8), 29 U.S.C. § 794 and 42 U.S.C. § 12131.

18. Defendant, by its actions, has intentionally, maliciously and with reckless indifference discriminated against Ms. Garrett because of her disability with regard to her termination/demotion, employee compensation, benefits, and

other terms and conditions of employment. 42 U.S.C. § 12112, 29 U.S.C. § 794 and 42 U.S.C. § 12132.

19. Defendant has limited and classified Ms. Garrett in a manner which adversely affects her opportunities, income and status because of her disability.

20. Furthermore, Defendant has failed to accommodate Ms. Garrett, including allowing her to return to work, work with intermittent leave or transferring her to a comparable position in both salary and status.

21. Moreover, Defendant has retaliated against Ms. Garrett in response to her request for reasonable accommodations and exercising any reasonable accommodations provided by law. 42 U.S.C. § 12203.

22. Restoring Ms. Garrett to her former position or an equivalent job would not have caused substantial or grievous economic injury to the operations of the Defendant.

VI. THE FAMILY MEDICAL LEAVE ACT

23. Plaintiff realleges and incorporates by reference paragraphs 1-22 above with the same force and effect as if fully set out in specific detail hereinbelow.

24. As stated, plaintiff is a person with a disability and serious health condition pursuant to 29 U.S.C. § 2611. Ms. Garrett had been employed with defendants for at least 12 months and requested authorized leave in compliance with 29 U.S.C. § 2613 and the certification requirements of her employer. Defendant is an employer in accordance with 42 U.S.C. § 2611.

25. Defendant violated the Family Medical Leave Act, 29 U.S.C. § 2614, inter alia, with regards to restoring plaintiff to the position she held before she requested authorized leave, or an equivalent position with equivalent employment benefits, pay and other terms and conditions of employment.

26. Defendant intentionally, maliciously and with reckless indifference denied Ms. Garrett restoration to the position she occupied before she requested authorized leave under the Family Medical Leave Act.

27. Restoring Ms. Garrett to her former position or an equivalent job would not have caused substantial or grievous economic injury to the operations of the defendant.

VII. PRAYER FOR RELIEF

WHEREFORE, the Plaintiff respectfully prays that this Court assume jurisdiction of this action and after trial:

1. Issue a declaratory judgment that the employment policies, practices, procedures, conditions and customs of the defendant including the action taken against plaintiff by defendant are violative of Plaintiff's rights as secured by the Americans with Disabilities Act, Titles I, II and IV, 42 U.S.C. § 12101, et seq., the Rehabilitation Act of 1973, Section 504, 29 U.S.C. § 794 and the Family Medical Leave Act, 29 U.S.C. § 2611 et seq.

2. Grant Plaintiff a permanent injunction enjoining the Defendant, its agents, successors, employees, attorneys and those acting in concert with the Defendant, and at the Defendant's request, from continuing to violate Plaintiff's rights as well as others who are similarly-situated pursuant to the Americans with Disabilities Act, Titles I, II and IV, the Rehabilitation Act of 1973, Section 504 and the Family Medical Leave Act, 29 U.S.C. § 2611 et seq.

3. Enter an Order awarding the Plaintiff damages including backpay, frontpay, nominal, liquidated, compensatory and punitive damages.

4. Award Plaintiff reasonable costs, attorney's fees and expenses.

5. Award such other relief and benefits as the cause of justice may require.

Respectfully submitted,

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PLAINTIFF DEMANDS A TRIAL BY STRUCK JURY.

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IN THE SUPREME COURT

OF THE UNITED STATES

[Caption Omitted in Printing]

Order Granting Petition for a Writ of Certiorari Limited to Question 1 Presented by the Petition entered on April 17, 2000.

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Supreme Court, U.S.
FILED
JUN 22 2000
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(6)

No. 99-1240

IN THE
Supreme Court of the United States

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA AND THE ALABAMA DEPARTMENT OF YOUTH SERVICES,
Petitioners,

v.

PATRICIA GARRETT AND MILTON ASH,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTION PRESENTED

Do Title I and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.*, exceed Congress's enforcement authority under section 5 of the Fourteenth Amendment?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is reported at 193 F.3d 1214 (1999), and the decision of the United States District Court for the Northern District of Alabama is reported at 989 F. Supp. 1409 (1998).

JURISDICTION

The Eleventh Circuit issued its decision on October 26, 1999, and petitioners filed their petition for a writ of certiorari on January 24, 2000. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

Title I of the ADA provides in part:

> "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."

42 U.S.C. § 12112(a).

Title II of the ADA provides in part:

> "Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

42 U.S.C. § 12132.

The relevant provisions of Title I and Title II, together with the abrogation provision applicable to both of them, *see* 42

U.S.C. § 12202, are reproduced at Appendix D of this brief.

The Fourteenth Amendment provides in pertinent part:

Section 1: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Section 5: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

STATEMENT

As this case comes to the Court, all 50 States prohibit government-based discrimination against the disabled and, more, affirmatively require all manner of employment and public-access accommodations designed to provide the disabled with the kind of equal opportunity and dignity that all individuals deserve. *See* App. A. The Federal government, to its credit, does likewise.

The United States Constitution places few if any limitations on the passage of such sensible measures, be they Federal laws applicable to its employees and its services or equivalent State laws. But it does limit the authority of one sovereign to regulate another sovereign's efforts to advance these vital objectives. No State, for example, may impose a money-damages remedy on the Federal government for its mistreatment of a disabled Federal employee. And that is true even though the employee resides in the State, even though all other disabled residents of the State may invoke its civil-rights laws for their protection, and even though the Federal government does not provide a comparable money-damages remedy. The Federal government does not permit, and to our knowledge never has permitted, a State so to abrogate the United States' immunity from suit. In protecting that policy choice, the Constitution leaves such waivers to the National Government and to it alone. As *McCulloch v. Maryland*, 17

U.S. (4 Wheat.) 316 (1819), indicates, even the most muscular view of the Constitution's protection of individual liberties faces structural limitations, whether in the area of age, free exercise, or disability discrimination.

Consistent with a government of "dual sovereigns," *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991), these structural limitations run in the other direction as well. Much as the Supremacy Clause prevents States from providing Federal employees with injunctive or monetary remedies under State law, the Eleventh Amendment limits Congress's authority unilaterally to impose Federal money-damages remedies on State employers. Save when the States have violated the constitutional rights of their citizens in the past or stand prepared to do so in the future, no such remedial authority exists. *See City of Boerne v. Flores*, 521 U.S. 507 (1997).

This constitutional case thus does not turn on whether two governmental remedies for claims of disability discrimination — one State, one Federal — are preferable to one. It instead turns on whether Congress has satisfied the traditional requirements for imposing extra-constitutional obligations on the States. Yet, in enacting Title I and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq*. ("ADA"), and more specifically in enacting the abrogation provision applicable to each title, *see* 42 U.S.C. § 12202, Congress did not comply with these structural requirements.

Alabama does not make this claim lightly. The ADA advances a commendable objective — mandatory accommodation of the disabled — and does so at the end of a lawmaking process that is as deserving of respect as each of the State lawmaking processes that it purports to displace. But the ADA's attempted "expansion of Congress's powers" at the expense of a "corresponding diminution of state sovereignty," *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976), would work a

reallocation of the Federal-State balance that in the end would pose more threats to the cause of liberty than it would cure.

Nor has the preservation of this Federal-State balance and these dual lines of accountability been without effect. "[T]each[ing]" by their "example," *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting), all 50 States have provisions of their own designed to guard against disability discrimination by the sovereign. *See* App. A. These laws and administrative regulations predate passage of the ADA, far exceed the rational-basis requirements of equal-protection review, *see Schweiker v. Wilson*, 450 U.S. 221 (1981); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985); *Heller v. Doe*, 509 U.S. 312 (1993), all permit monetary relief against the sovereign, and in the end markedly overprotect rather than underprotect the constitutional rights of the disabled. *See* App. A. As one Federal legislator pointedly acknowledged during debates over the ADA: "This is probably one of the few times where the states are so far out in front of the federal government, it's not funny." *Hearing Before the House Subcommittee on Select Education*, 101 Cong. 5 (Oct. 6, 1989) (Rep. Moakley).

On this record, the extra-constitutional requirements of the ADA cannot credibly be justified as permissible section 5 legislation. No pattern and practice of State equal-protection violations exist when it comes to alleged employment or public-access discrimination by State governments. Neither does any tenable threat of future unconstitutional discrimination exist, least of all the kind that would justify imposing this type of legislation on every State in the country or would justify doing so into perpetuity. The legislative record also demonstrates nothing to the contrary. Congress did not show, or even try to show, that the States have previously violated the constitutional rights of the disabled. Accordingly, while States remain free to waive their sovereign immunity from disability-discrimination claims on their own,

Congress cannot in this instance abrogate that immunity for them.

A. History of State Disability Laws.

Disability-discrimination laws are a twentieth century innovation, and a State innovation at that. Before the mid-nineteenth century, most Americans treated disabilities at home if they treated them at all. Social policies for supporting the disabled varied so greatly from place to place that it would be difficult to speak of any uniform approach. As exemplified by an 1849 Wisconsin law, each community coped as best it could under a general obligation to "relieve and support all poor and indigent persons, lawfully settled therein, whenever they shall stand in need thereof." Edward Berkowitz, *Supporting Disability: An Historical Perspective, American Rehabilitation*, Apr. 1, 1999, at 27.

Prompted in part by the large number of veterans returning home from the Civil War, localized movements aimed at rehabilitating rather than just supporting persons with disabilities emerged in the late nineteenth century. *See* Gary L. Albrecht, *The Disability Business: Rehabilitation in America* 97 (1992). Again, however, these efforts — most of them privately sponsored — involved not the creation of legal rights for the disabled but additional mechanisms for supporting and rehabilitating them. For example: In 1889, the Cleveland Rehabilitation Center "began as a program for crippled children" which "gradually oriented toward the problems of the disabled adult as well," W. Scott Allan, *Rehabilitation: A Community Challenge* 7 (1958); in 1893, Boston established a vocational school for disabled children; and in 1897 Minnesota became the first State to make provisions for medical care for disabled children, *see* Department of Vocational Teacher Education, University of Arkansas & Arkansas Vocational Rehabilitation Agency, *History, Philosophy and Principles of Vocational Rehabilitation* 5 (1957). The Curative Workshop of

Milwaukee, begun in 1919, was another early venture into the field of rehabilitation. *See* Allan, *supra*, at 7. By 1920, twelve States had enacted legislation for the vocational training and rehabilitation of disabled citizens. *Id.*

Not until the 1940s, however, did the first laws designed to guarantee access rights for the disabled come into existence. They were State provisions and were known as "white cane" laws. Authored by Jacobus tenBroek, president of the National Federation of the Blind, *see Hearing Before the House Subcommittee on Surface Transportation*, 101 Cong. 293 (Sept. 20, 1989) (James Gashel, National Federation of the Blind), they initially applied just to the visually impaired. To our knowledge, Missouri became the first State to enact such a law in 1941, when it provided that "[a]ny blind person . . . shall . . . be entitled to any and all accommodations, advantages, facilities and privileges of all public conveyances and all places of public accommodations." 1941 Mo. Laws p. 344 § 1 (codified at MO. REV. STAT. § 209.150). Other States soon followed suit and eventually extended the provisions to other disabilities as well. The current Arizona law is typical: "The legally blind, visually impaired, the deaf and auditorially impaired and the physically handicapped have the same rights as all persons to the use of all streets, highways, walkways, common carriers, public lodging places, public eating places, public amusements and other places to which the general public is invited." ARIZ. REV. STAT. § 11-1024 (1990 & Supp. 1999). These State laws represented "[p]erhaps the first attempts to ensure greater access for disabled people through statutory protections." Richard K. Scotch, *From Good Will to Civil Rights: Transforming Federal Disability Policy* 28 (1984). Today, all 50 States have comprehensive measures guaranteeing the disabled access to public services and places. *See* App. A.

States also marked the initial legislative path in enacting laws barring disability discrimination in the workplace.

Twenty-five years before passage of the ADA, Wisconsin in 1965 enacted a disability-discrimination law applicable to public and private employers. *See* 1965 Wis. Laws ch. 230. Led by Wisconsin's example, other State legislatures soon followed course. By 1980, more than 30 States had enacted such measures. And by 1990, when Congress enacted the ADA, 50 States had passed such laws or regulations. *See* App. A.

Today, all States still have disability-discrimination provisions applicable to public employment. Now, as then, they continue to bar disability discrimination in a variety of contexts (*e.g.*, hiring, terms of employment, discharge), permit injunctive relief, permit monetary-relief claims against the sovereign, cover virtually all forms of public employment, in some instances authorize punitive damages, and in other instances authorize criminal penalties. *See* App. A. Not only do these laws forbid the same types of practices as the ADA, but many of them offer more avenues of relief and contain proactive hiring policies designed affirmatively to attract the disabled to public service. *Id.*

B. History of Alabama Disability Laws.

Like her sister States, Alabama has a long history of providing support, rehabilitation and protection for individuals with disabilities. Three years before the Civil War and ten years before ratification of the Fourteenth Amendment, Dr. Joseph Henry Johnson founded the Alabama School for the Deaf in 1858. Robert Hill Couch & Jack Hawkins, Jr., *Out of Silence and Darkness: The History of the Alabama Institute for Deaf and Blind 1858-1983* 21-32 (1983); *see* Act of Jan. 27, 1860, No. 253, 1859-60 Ala. Acts 344. Nine years later, the State opened the Alabama Academy for the Blind on the same campus. *Id.* at 44; *see* Act of Feb. 18, 1867, No. 490, 1866-67 Ala. Acts 550. The Alabama legislature created the Department of Adult Blind and Deaf in 1939. *See* ALA. CODE § 21-1-15. And in 1955, the Alabama Institute for the Deaf

and Blind began a program for deaf-blind children, later named the Helen Keller School of Alabama. Couch & Hawkins, *supra*, at 178-79. That same year, the State legislature expanded employment opportunities for the visually impaired by establishing Home Industries for the Blind, ALA. CODE § 21-2-1 to -4, and passed a law providing for the operation of vending stands by blind persons in all State owned or leased properties. *See* ALA. CODE § 21-1-40 to -41.

Nor have Alabama's efforts been confined to the visually and hearing impaired. Prompted by the return of veterans from World War I, Alabama like much of the Nation launched additional governmental efforts to support rehabilitation and employment of persons with other disabilities in the 1920s. *See generally* George R. Weir, *Government and the Handicapped: The Alabama Vocational Rehabilitation Program* 3-5 (1960) (describing growth of the Alabama vocational rehabilitation program from the 1920s to 1950s). By the late 1950s, Alabama's vocational rehabilitation program included services for persons with physical disabilities, mental disabilities, and severe disabilities, as well as the deaf and blind. *Id.* at 10-14.

In addition to these efforts, Alabama launched several other initiatives in the 1960s. It enacted legislation giving persons with disabilities preferential treatment in hiring for State employment under the State Merit System. Act of Sept. 30, 1965, No. 119, 1965 Ala. Acts, 2d Ex. Sess. 166 (codified at ALA. CODE § 36-26-16 (1975)). Three years prior to the federal Architectural Barriers Act of 1968, it enacted legislation making all public buildings and facilities accessible to disabled persons. Act of Aug. 9, 1965, No. 224, 1965 Ala. Acts 315 (codified as amended at ALA. CODE §§ 21-4-1 to -7 (1975)). And in 1965, it created the Governor's Committee on Employment of the Handicapped "to promote the employment of the physically, mentally, emotionally, and otherwise

handicapped citizens of Alabama." Act of Aug. 10, 1965, No. 226, § 1, 1965 Ala. Acts 323, 323 (codified at ALA. CODE § 21-5-1 (1975)); *see generally* ALA. CODE §§ 21-5-1 to -10 (1975).

In 1975, after an assassination attempt left Alabama's Governor paralyzed from the waist down, the State enacted other measures codifying the rights of disabled persons. "It is the policy of this State," one such measure said, "to encourage and enable the blind, the visually handicapped and the otherwise physically disabled to participate fully in the social and economic life of the State and to engage in remunerative employment." Act of Oct. 7, 1975, No. 869, § 1, 1975 Ala. Acts 1711, 1711 (codified at ALA. CODE § 21-7-1); *see generally* ALA. CODE §§ 21-7-1 to 21-7-10 (1975). The legislation gave disabled persons additional guarantees of access to public buildings, facilities and property, ALA. CODE § 21-7-2, and declared that persons with disabilities were "entitled to full and equal accommodations, advantages, facilities and privileges of all common carriers" and in all "places of public accommodation." ALA. CODE § 21-7-3. At the same time, the legislation reinvigorated the State's commitment to employing persons with disabilities in the civil service, ensuring that they

> shall be employed in the state service, the service of the political subdivisions of the state, in the public schools and in all other employment supported in whole or in part by public funds on the same terms and conditions as the able-bodied, unless it is shown that the particular disability prevents the performance of the work involved.

ALA. CODE § 21-7-8. Finally, the legislation made denial of or interference with the rights of disabled persons a criminal misdemeanor. ALA. CODE § 21-7-5.

Today, Alabama residents with disabilities continue to be given preferential treatment in hiring for State employment.

ALA. CODE §§ 21-7-8, 36-26-16. And while the focus of the State's employment laws centers on giving individuals the right to seek a job, not the right to file a lawsuit, the State also provides equitable and monetary remedies to disabled persons who experience employment discrimination by State governmental agencies. Ala. Admin. Code r. 670-x-4-.01, -.03 (1981). A more complete summary of the programs Alabama provides for its disabled residents, including those provided by the University of Alabama, is produced at Appendix B.

C. History of the ADA.

The States have not been alone in addressing these issues. To the National Government's credit, many Federal laws provide support and rehabilitation for disabled individuals, many others create civil rights for the disabled, and still others provide extensive funding for national and local efforts designed to remove barriers to full participation by the disabled in a diverse array of public and private services. *See* App. C.

The first Federal anti-discrimination law regarding the issues presented in this case — employment and access to public services — dates from 1973. In that year, Congress enacted section 504 of the Rehabilitation Act, which prohibited State recipients of Federal funding from discriminating on the basis of disability with respect to employment and access to governmental services. *See* 29 U.S.C. § 794. This Spending Clause legislation, however, did not apply generally to private entities, did not apply to Congress, did not apply to Federal agencies (until 1978), and did not apply to State entities who had not received Federal funding.

In 1990, Congress took a different tack. In enacting the Americans with Disabilities Act, it extended the requirements of the Rehabilitation Act, among others, to private employers and to all States without regard to whether they had received

Federal funding. The Act contains a series of legislative findings, then sets forth prohibitions against discrimination in employment (Title I), public services (Title II), and public accommodations (Title III).

Findings and Purpose. At no point do the statutory findings or purpose indicate that the Act is designed to remediate or deter constitutional violations. While the Act invokes Congress's section 5 and Commerce Clause powers, 42 U.S.C. § 12101(b)(4), the findings do not identify any pattern and practice of State violations of the Equal Protection Clause or for that matter even a single State violation of this or any other constitutional guarantee. The statute itself acknowledges that its purpose is to "enforc[e] the standards established in this chapter," as opposed to the standards established by the Fourteenth Amendment. 42 U.S.C. § 12101(b)(3).

The findings provide that "individuals with disabilities are a discrete and insular minority who have been . . . relegated to a position of political powerlessness in our society." 42 U.S.C. § 12101(a)(7). They analogize disability with age, noting that some 43 million Americans "have one or more physical or mental disabilities," the number of which "is increasing as the population as a whole is growing older." *Id.* at (a)(1). They provide that the disabled have long been subjected to "discrimination" but do not claim that this differential treatment stems from State action, let alone unconstitutional State action. *Id.* at (a)(2-5). They describe several societal problems suffered by the disabled: (1) that "historically, society has tended to isolate and segregate individuals with disabilities," and, "despite some improvements, such forms of discrimination . . . continue to be a serious and pervasive social problem," *id.* at (a)(2); (2) that "census data, national polls, and other studies have documented that people with disabilities . . . are severely disadvantaged socially, vocationally, economically, and educationally," *id.* at (a)(6), and (3) that "unfair and

unnecessary discrimination . . . costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity," *id.* at (a)(9). The findings also identify several aspirational goals regarding treatment of the disabled — among them "to assure equality of opportunity, full participation, independent living, and economic self-sufficiency," *id.* at (a)(8), and to provide "legal recourse" that the disabled often have not had, *id.* at (a)(4).

Employment. Title I of the ADA addresses employment. It prohibits any "covered entity," which is defined to include States, 42 U.S.C. § 12111(2), (5)(A), & (7) (incorporating 42 U.S.C. § 2000e), from "discriminat[ing] against a qualified individual with a disability" with respect to hiring, advancement, discharge, compensation or other terms of employment. 42 U.S.C. § 12112(a). The Act defines "qualified individual with a disability" based on the ability to perform "the essential functions" of the job. 42 U.S.C. § 12111(8). Among other prohibitions, the general rule against discrimination "includes":

(1) "not making reasonable accommodations to the known physical or mental limitations" of an individual that would impose no "undue hardship," 42 U.S.C. § 12112(b)(5)(A);

(2) "utilizing standards, criteria, or methods of administration . . . that have the effect of discrimination on the basis of disability," *id.* at (b)(3);

(3) "denying equal jobs or benefits" because of the disability of someone with whom the employee or applicant has a relationship or association, *id.* at (b)(4);

(4) "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out" individuals with disabilities, unless the test is "job-related" and "consistent with business necessity," *id.* at (b)(6); and

(5) "failing to select and administer tests concerning employment in the most effective manner to ensure that" they reflect the skills of the applicant rather than "reflecting impaired sensory, manual, or speaking skills," *id.* at (b)(7).

The Act also indicates that prohibited discrimination "shall include medical examinations and inquiries." 42 U.S.C. § 12112(d)(1). In a pre-employment setting, such examinations are permitted only "after an offer of employment." *Id.* at (d)(3). Once the individual becomes an employee, such examinations may not be required unless they are "shown to be job-related and consistent with business necessity." *Id.* at (d)(4)(A).

Each of these requirements is subject to the "enforcement" provisions of Title I. Under that section, a claimant may seek relief against his or her employer under the "powers, remedies, and procedures" of Title VII, which includes authority to seek money damages. *See* 42 U.S.C. §§ 12117(a), 2000e-5. In enacting this provision, Congress purported to abrogate the States' immunity from suit. 42 U.S.C. § 12202.

Access To Public Services. Title II of the ADA applies to "public services" furnished by governmental entities and is divided into two parts. Part A contains a general accommodation provision applicable to any "public entity," which is defined to cover "any State or local government." 42 U.S.C. § 12131(1)(A). The core term — "qualified individual with a disability" — is defined to include individuals

> who, with . . . reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131(2). The accommodation rule then provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Any violation of the provision is subject to the "enforcement" requirements of Title II, which incorporates the "remedies, procedures, and rights" applicable to section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794a, including money damages. 42 U.S.C. § 12133. Congress again purported to abrogate the States' immunity from suit in enacting this provision. *See* 42 U.S.C. § 12202.

Part B of Title II contains extensive provisions regulating public transportation services. These include requirements regarding handicap access to public buses and passenger trains. 42 U.S.C. §§ 12141-12165.

Title III essentially repeats many of the accommodation and access requirements of Title II, but it applies only to private entities. In contrast to Title II, however, the enforcement provision permits only injunctive, not money-damages, relief unless the United States (as opposed to a private litigant) brings the action. *See* 42 U.S.C. § 12188(a), (b).

In 1990, as today, neither Title I nor Title II applies generally to the Federal government. While the Congressional Accountability Act of 1995 extends the provisions of the ADA to both houses of Congress, the ADA still does not apply to the executive-branch agencies of the United States. After the 1978 amendments to the Rehabilitation Act of 1973, to be sure, section 501 of that Act (concerning employment, like Title I of the ADA) and section 504 of that Act (concerning public access, like Title II of the ADA) apply to Federal agencies. Yet the United States permits money-damages actions against Federal agencies only in the context of section 501/employment claims, though not generally in the context of section 504/public-access claims. *See Lane v. Pena*, 518 U.S.

187 (1996). In contrast, the ADA permits money-damages relief against the States under both Title I and Title II and purports expressly to abrogate the States' immunity from suit in doing so. *See* 42 U.S.C. § 12202. It is this attempted abrogation that became the prologue to this dispute.

D. Factual Background

Two claimants filed these actions, one against the Alabama Department of Youth Services, the other against the University of Alabama. In both instances, claimants sought money-damages relief against their State employers and in both instances did so in Federal court.

a. Ash v. Alabama Department of Youth Services. In 1997, Milton Ash filed this action in the Northern District of Alabama, Southern Division, against his employer, the Alabama Department of Youth Services. In doing so, he sought relief for alleged discrimination under Titles I and II of the ADA along with section 504 of the Rehabilitation Act of 1973. According to the complaint, his alleged disability consists of "severe chronic asthma, sleep apnea, obstructive pulmonary disease and diabetes," all of which "limit his ability to . . sleep, breathe, care for himself and work." Joint Appendix ("J.A.") 6.

Mr. Ash began working for the Department in 1993 as a security officer, at which point he allegedly told his employer that he should not be exposed to carbon monoxide or cigarette smoke. J.A. 7. In his view, he was initially discriminated against because his job required him to drive cars that emitted carbon monoxide into the passenger compartment and because the Department did not enforce its no-smoking policy. *Id.* Then, after he complained about these problems, he alleges that the Department retaliated against him — specifically, by just giving him "meets standards" evaluations rather than the "exceeds standards" evaluations to which he had become accustomed and by declining a request to work the day shift to

accommodate his sleep apnea. *Id.* at 8-9. Mr. Ash sought "compensatory and punitive damages" for this alleged discrimination, *id.* at 11, after which the State filed a motion to dismiss on sovereign immunity grounds.

b. Garrett v. The University of Alabama. On January 14, 1997, Patricia Garrett filed this action against her employer, the Board of Trustees of the University of Alabama ("UAB"), in the Northern District of Alabama, Southern Division. She likewise brought the action under Title I and Title II of the ADA and section 504 of the Rehabilitation Act, and also sought relief under the Family Medical Leave Act ("FMLA"). *Id.* at 21.

Ms. Garrett began working at the University of Alabama Hospital, located on the campus of the University of Alabama at Birmingham, in 1977. She started her employment there as a registered nurse and along the way received several administrative promotions. In September 1994, she was diagnosed with breast cancer after which she underwent a lumpectomy followed by radiation and chemotherapy. *Id.* at 39. According to the complaint, this condition "substantially limits her ability to . . . sleep, care for herself and work." *Id.* at 38. When she began undergoing chemotherapy in January 1995, she took intermittent leave under the FMLA and from March 1995 to July 1995 she eventually took full leave under the law. *Id.* at 39-40. Upon her return from family medical leave, Ms. Garrett alleges that the hospital transferred her to a new position with a decrease in salary, then claims that the transfer amounted to discrimination on the basis of disability and a failure to accommodate her disability. *Id.* at 41-42. Ms. Garrett also seeks "compensatory and punitive damages," *id.* at 43, and UAB also filed a motion to dismiss on sovereign immunity grounds.

c. District Court. Presented with two cases involving money-damages claims against "instrumentalities of the State of Alabama," the district court issued a single opinion

addressing each action. *Garrett v. Board of Trustees of the University of Alabama*, 989 F. Supp. 1409 (N.D. Ala. 1998). In the court's view, the ADA exceeded Congress's enforcement power under section 5 of the Fourteenth Amendment because it compelled States to provide equal treatment "by guaranteeing special treatment or 'accommodation' for disabled persons." *Id.* at 1410. As a matter of law, it accordingly dismissed each of the ADA claims in their entirety, and ultimately did the same with respect to the Rehabilitation Act and FMLA claims.

d. Eleventh Circuit. After consolidating the two cases, the court of appeals reversed. "[B]ound" by its prior decision in *Kimel v. Florida Board of Regents*, 139 F.3d 1426 (11th Cir. 1998), which addressed the constitutionality of the ADA and the Age Discrimination in Employment Act, the court concluded that the ADA constituted legitimate section 5 legislation.

SUMMARY OF ARGUMENT

Title I and Title II of the ADA cannot be sustained as permissible exercises of Congress's unconditional power to supply a remedy for Fourteenth Amendment violations or of its conditional power to prohibit what the Constitution does not.

1. In purporting to address unconstitutional State discrimination against the disabled, the ADA does not proscribe what the Equal Protection Clause proscribes. Equal protection review of classifications based on disability, like those based on age, requires only that the law "be rationally related to a legitimate governmental purpose." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446 (1985); *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 645 (2000). The ADA, in contrast, imposes disparate-impact and mandatory-accommodation rules that have no pedigree in any constitutional setting, whether the claim involves denial of

equal protection based on race, religion, age or disability. While judicial second-guessing of a State's policy choices is virtually non-existent under rational-basis review, the ADA also requires courts to scrutinize all such decisions affecting the disabled and imposes the burden of persuasion on the States in doing so. What the ADEA did for the elderly, the ADA ultimately attempts to do for the disabled, if not more. At a minimum, it "has effectively elevated the standard for analyzing [disability] discrimination to heightened scrutiny." *Kimel*, 120 S. Ct. at 648. Neither Title I nor Title II of the ADA accordingly can be sustained on core section 5 grounds — that they supply a remedy for constitutional violations.

2. The ADA also cannot be sustained as a permissible exercise of Congress's prophylactic authority to ban what the Constitution does not.

a. The law, to begin with, lacks the necessary predicate of a "widespread pattern" of unconstitutional conduct for invoking this unique authority. *Kimel*, 120 S. Ct. at 649 (citing *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 641 (1999) (quotation omitted)). In passing the ADA, Congress did not identify any pattern or practice of unconstitutional State action, or for that matter even a single instance of such conduct. Add to this the fact that all 50 States currently ban public-access and employment discrimination against the disabled, and it becomes clear that "Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of [disability]" or doing so with respect to public-access accommodations. *Kimel*, 120 S. Ct. at 636.

b. The ADA also independently fails the Court's proportionality requirement. Above all, it is "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne*, 521 U.S. at 532.

Start with the manifest differences between judicial review of an ADA claim and review of an equal-protection claim: (1) The ADA requires individualized case-by-case determinations as to whether a disabled employee is qualified for the job, 29 C.F.R. § 1630.9, 42 U.S.C. §§ 12112(b)(5)(A), 12131(2), 28 C.F.R. § 35.130(b)(7), not "generalization[s]" based on physical and mental capacity, *Heller*, 509 U.S. at 312; (2) the ADA places the burden of proof on States to justify their conduct, 42 U.S.C. §§ 12112(b)(5)(A), (b)(6), not the claimant, *Heller*, 509 U.S. at 319; (3) the ADA prohibits any rule or practice that has a disparate impact unless the State can prove that it is "job-related" or "consistent with business necessity," 42 U.S.C. § 12112(b)(6), while the Constitution permits rules that "in practice . . . result[] in some inequality," *Heller*, 509 U.S. at 320-21, and does so even in the area of race and gender discrimination, *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979); *Washington v. Davis*, 426 U.S. 229 (1976); (4) the ADA compels States to provide "reasonable accommodations" for disabled employees unless it "impose[s] an undue hardship," 42 U.S.C. § 12112(b)(5)(A), while the Constitution permits employment decisions based on disability so long as they are rationally based, *City of Cleburne*, 473 U.S. at 444; and (5) the ADA compels the State to make "reasonable modifications" in its public services to accommodate the disabled unless they would "fundamentally alter" the nature of the program, 42 U.S.C. §§ 12131(2), 12132; 28 C.F.R. § 35.130(b)(7), while the Constitution contains no such requirement, *City of Cleburne*, 473 U.S. at 444. Far from being calibrated to correct rational-basis violations, the ADA borrows from and even extends the constitutional framework associated with discrimination claims based on race, gender or religion. As in *Kimel*, the law represents an impermissibly disproportionate exercise of section 5 authority.

c. Nor has the Court ever upheld a prophylactic exercise of section 5 power in the setting of non-suspect classifications.

Still less has it done so in the context of a congressional record revealing no State equal-protection violations plus the existence of 50 State anti-discrimination provisions, all of them pre-dating the ADA's application to the States. Under these circumstances, the ADA has no more connection to correcting Fourteenth Amendment violations than the Age Discrimination in Employment Act in *Kimel*, the RFRA in *City of Boerne*, the Lanham Act in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), the Patent Remedy Act in *Florida Prepaid*, or the voting-rights provisions in *Oregon v. Mitchell*, 400 U.S. 112 (1970).

A contrary view not only would abandon precedent but also would have no fathomable stopping point. Only a most unimaginative legislature would be unable to use this theory to nationalize all manner of equal protection, procedural due process, substantive due process, or incorporated Bill of Rights' standards. And any law that is itself rational could fairly be said to curb the risk of irrational State lawmaking in the area. No doubt the Federal government may lead by example in regulating the rights of its own employees, or even more so, by waiving *its* immunity from State-law anti-discrimination actions filed in State court. But it is not the case that self-restraint remains the only restriction that the Constitution's "limited and enumerated powers" (*New York v. United States*, 505 U.S. 144, 156 (1992)) place on Congress's efforts to exercise such broad lawmaking authority over the States.

ARGUMENT

Three lines of constitutional precedent frame this dispute and go a long way to resolving it. The first is that Congress may not use its Commerce Clause powers to abrogate a State's immunity from suit; only a permissible exercise of Congress's enforcement authority under the Fourteenth Amendment may do so. *See Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

The second is that section 5 allows Congress only to remediate or deter constitutional violations; it does not authorize the legislative branch to redefine the right or what comes to the same thing — stack one protective rule upon another in a way that lacks any congruence or proportionality to the underlying constitutional guarantee. *See City of Boerne v. Flores*, 521 U.S. 507 (1997). The third is that classifications regarding the disabled, like classifications regarding the aged, receive rational-basis review, not heightened scrutiny such as legislative distinctions affecting race or gender. *See Heller v. Doe*, 509 U.S. 312 (1993); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985).

At no point in this case have plaintiffs or the Federal government challenged any of these underlying tenets. Nor, unlike the lower-court proceedings in this case regarding the validity of section 504 of the Rehabilitation Act, do they rely on the Spending Clause to sustain the ADA.

Alabama likewise has not challenged Congress's authority under the Commerce Clause to regulate State employees through the ADA. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Nor has it challenged an individual's authority to bring an injunction action against State officials in Federal court, *see Ex parte Young*, 209 U.S. 123 (1908), or the Federal government's authority to bring a claim for injunctive and monetary relief against States in Federal court, *see Employees of the Dep't of Pub. Health and Welfare v. Missouri Pub. Health Dep't*, 411 U.S. 279, 286 (1973).

In resolving a similar dispute last Term, *see Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631 (2000), the Court applied a virtually identical framework. There, as here, the underlying constitutional claim received rational-basis review. There, as here, Congress failed to establish any record of constitutional violations by State governments. And there, as here, all 50 States had laws and regulations of their own

designed to root out precisely such forms of discrimination. Under these circumstances, *Kimel* declined to allow Congress to use its section 5 authority to convert presumptively constitutional classifications based on age into presumptively invalid classifications under the Age Discrimination in Employment Act. A similar conclusion applies to Title I and Title II of the ADA.

I. THE SECTION 5 POWER IS REMEDIAL IN NATURE AND MUST BE EXERCISED CONGRUENT WITH AND PROPORTIONAL TO CONSTITUTIONAL WRONGS.

> "Section 1 . . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const. amend. XIV, § 1.

> "Section 5. Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

U.S. Const. amend. XIV, § 5.

By its terms, section 5 combines a broad power (to pass "appropriate legislation") with a broad limitation on that power (to do so only when "enforc[ing] . . . the provisions of this article"). "[T]he same language that serves as the basis for the affirmative grant of congressional power also serves to limit that power." *Kimel*, 120 S. Ct. at 644. Consistent with the "design of the Amendment and the text of § 5," the Court has made clear that the enforcement power is a "remedial" one. *City of Boerne*, 521 U.S. at 519.

In accordance with the remedial nature of section 5, judicial review of enforcement legislation "must first identify the Fourteenth Amendment 'evil' or 'wrong' that Congress intended to remedy." *Florida Prepaid*, 527 U.S. at 639 (citing *City of Boerne*, 521 U.S. at 525); *see Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 (1976) (section 5 "stand[s] behind," not in front of, the "imperatives" of section 1). The Court then asks

whether the legislation merely bans violations of the Fourteenth Amendment as the Court has defined them, or exceeds those requirements in order correctively to "remedy" past violations or "prevent" future ones.

Congress has "much deference" (*City of Boerne*, 521 U.S. at 536) in the first respect. When passing laws that remedy ongoing State action that itself violates the Fourteenth Amendment, Congress poses no threat to the national separation of powers and specifically "the province of the Judicial Branch . . . to say what the law is," *id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). Nor, so long as there is some "proportionality" between the underlying violation and the law's remedy, does such legislation threaten the Federal separation of powers by "contradict[ing] vital principles necessary to maintain" the "balance" between the States and the National Government. *Id.* Accordingly, whether exercising its right to prohibit State action that violates the Fourteenth Amendment, *see, e.g., Ex parte Virginia*, 100 U.S. 339 (1879), to establish a cause of action for violations of the Amendment, *see* 42 U.S.C. § 1983, or to provide a forum for constitutional claims, *see Strauder v. West Virginia*, 100 U.S. 303 (1879), Congress has broad power to legislate in this regard.

Section 5 legislation that prohibits what the Constitution does not, however, is another matter. Such laws invariably present the twin risks of parliamentarian supremacy, in which the legislature assumes plenary authority to define the outer limits of its own power and plenary authority to bend State sovereign functions to its will. "[L]imitations" on the exercise of such potential power "are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government." *United States v. Morrison*, 120 S. Ct. 1740, 1755 (2000). Before upholding such legislation, the Court thus imposes at least two requirements: (1) a predicate

"pattern or practice of unconstitutional conduct," *City of Boerne*, 521 U.S. at 534; *Florida Prepaid*, 527 U.S. at 639-41; *Kimel*, 120 S. Ct. at 648-49; and (2) a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end," *City of Boerne*, 521 U.S. at 520; *Kimel*, 120 S. Ct. at 644.

II. THE ADA CANNOT BE SUSTAINED AS TRADITIONAL ENFORCEMENT LEGISLATION THAT PROHIBITS CONSTITUTIONAL VIOLATIONS.

A. Alleged Discrimination Against The Disabled Receives Rational-Basis Review.

The Court has applied traditional rational-basis review in at least three equal-protection cases involving the disabled. *See Heller*, 509 U.S. at 321. The first of these cases involved an allegation that the Federal government had discriminated against the disabled in the provision of Medicaid benefits. At issue in *Schweiker v. Wilson*, 450 U.S. 221 (1981), was whether the United States had denied equal protection by giving supplemental social security benefits to individuals in public mental institutions funded under Medicaid while denying benefits to those situated in hospitals that were not Medicaid funded. Claimants argued that the disability classifications triggered heightened scrutiny, and that the law at any rate failed the more modest requirements of rational-basis review. Unconvinced that the Federal law ultimately "classif[ied] directly on the basis of mental health," *id.* at 231, the Court did not "reach" the claim that "heightened" review applied, and accordingly it applied rational-basis scrutiny, *id.* at 230-31.

In doing so, the Court pointed out that the standard did "not allow" it "to substitute . . . personal notions of good public policy for those of Congress." *Id.* at 234. So long as the law advances a rational public objective, the Court would

"disregard the existence of other methods of allocation that we, as individuals, perhaps would have preferred." *Id.* at 235. The Court ultimately found the legislative scheme rationally justified by Federal "budgetary constraints" and the view "that Congress should have discretion in deciding how to expend necessarily limited resources." *Id.* at 238-39.

The next case came four years later — this time involving a city. In *City of Cleburne*, 473 U.S. 432, the issue was whether a municipality had violated equal protection by denying a zoning permit requested by a group home for mentally disabled individuals. Claimants again sought heightened review of their claim.

At the outset the Court described the differences between rational-basis review and heightened scrutiny. "The general rule," the Court began, "is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Id.* at 440. "When social or economic legislation is at issue," the Court continued, "the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *Id.* (citations omitted).

In contrast, race and gender receive "heightened" scrutiny because they "are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy" and rarely provide a "sensible ground for differential treatment." *Id.* Laws, for example, "distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women." *Id.* at 441. In contrast, the Court noted, it had "declined . . . to extend heightened review to differential treatment based on age" in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). 473 U.S. at 441. "The lesson of *Murgia*," the Court continued, "is that where individuals in

the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued." *Id.* at 441-42. "In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end." *Id.* at 442.

Against this backdrop, the Court concluded that disability did not "call[] for a more exacting standard of judicial review than is normally accorded economic and social legislation." *Id.* at 442. First, the Court reasoned that "those who are mentally retarded have a reduced ability to cope with and function in the everyday world" and are not "all cut from the same pattern," "rang[ing] from those whose disability is not immediately evident to those who must be constantly cared for. They are thus different, immutably so, in relevant respects, and the States' interest in dealing with and providing for them is plainly a legitimate one." *Id.* at 442. Second, the State and National legislative "response . . . to the plight of those who are mentally retarded demonstrates not only that they have unique problems, but also that lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary." *Id.* at 443. After cataloguing the broad number of State and Federal laws "singling out the retarded for special treatment," the Court observed: "[t]hat a civilized and decent society expects and approves such legislation indicates that governmental consideration of those differences in the vast majority of situations is not only legitimate but also desirable." 473 U.S. at 444.

Third, this national set of legislative initiatives, "which could hardly have occurred and survived without public

support, negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers." *Id.* at 445. Finally, the Court reasoned that if the "large and amorphous class of the mentally retarded" were treated as "quasi-suspect," "it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others" — including "the aging, the disabled, the mentally ill, and the infirm." *Id.* at 445-46. In the end, as with classifications based on age, the Court indicated that "we will not presume that any given legislative action, even one that disadvantages retarded individuals, is rooted in considerations that the Constitution will not tolerate." *Id.* at 446.

In applying this standard, however, the Court held that each of the conceivable justifications offered by the city for denying the proposed zoning permit "rest[ed] on an irrational prejudice against the mentally retarded." *Id.* at 450. Accordingly, the Court invalidated the city's application of its zoning requirement.

Eight years later, *Heller v. Doe*, 509 U.S. 312 (1993), adhered to this same framework in addressing a challenge to the different procedures that Kentucky used for involuntary civil commitment proceedings for those alleged to be mentally retarded and for those alleged to be mentally ill. As to the former, the burden of proof for involuntary commitment was clear and convincing evidence, while for the latter it was proof beyond a reasonable doubt. In addressing claimants' arguments that these distinctions violated equal protection, the Court initially rejected their efforts to apply heightened scrutiny. Although claimants had prevailed below and thus attempted to present an alternative ground for affirmance, the Court held the argument was "not properly presented" and proceeded to decide the "case as it has been presented" to the lower courts. *Id.* at 319.

In applying rational-basis review, *Heller* reaffirmed the difficulty of invalidating legislation on this ground. The law in such cases is not only accorded "a strong presumption of validity," *id.*, but the attacking party must "negative every conceivable basis which might support it," and the courts must "accept a legislature's generalizations even when there is an imperfect fit between means and ends," *id.* at 320-21 (quotation omitted). Such "'[a] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.'" *Id.* at 320 (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993)). Accordingly, even though the classification "in practice . . . results in some inequality," it will be upheld in view of the fact that "[t]he problems of government are practical ones and may justify, if they do not require, rough accommodations." *Id.* at 321 (quotations omitted).

Other decisions in other settings confirm that rational-basis review remains "a paradigm of judicial restraint," and, where applicable, makes State and Federal action "virtually unreviewable" under the Constitution. *Beach Communications*, 508 U.S. at 314, 316. Neither must the government "actually articulate at any time the purpose or rationale supporting its classification," *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992), as long as there is "any reasonably conceivable state of facts that could provide a rational basis for the classification," *Beach Communications*, 508 U.S. at 313. These decisions demonstrate that government rarely violates the Constitution by treating individuals differently on the basis of disability. If employment decisions subject to rational basis review need only be justified by *some* rational justification after the fact, *see, e.g.*, *id.* at 313-15; *Nordlinger*, 505 U.S. at 16-18, and if "government[] consideration[s]" of disability "in the vast majority of situations is not only legitimate but also desirable," *City of Cleburne*, 473 U.S. at 444, then it is the rare

classification based on disability that would rise to the level of a constitutional violation.

B. Judicial Review Under The ADA Is Far More Rigorous Than It Is Under The Equal Protection Clause.

By any measure, it cannot tenably be argued that the ADA and the Equal Protection Clause apply the same level of scrutiny to alleged discrimination against the disabled. According to the Court, legislative decisions in this area receive rational-basis review, and will not be invalidated unless they are "palpably arbitrary" and no conceivable set of facts supports them. *Nordlinger*, 505 U.S. at 18. Yet, according to Congress's purported efforts to enforce that provision, the ADA provides that unlawful "discrimination" includes (1) refusing to make all "reasonable accommodations" for the disabled that fall short of an "undue hardship," 42 U.S.C. § 12112(b)(5)(A), (2) using employment standards "that have the effect of discrimination," 42 U.S.C. § 12112(b)(3)(A), and (3) refusing to make "reasonable modifications" in its public services to accommodate the disabled unless they would "fundamentally alter" the nature of the program, 42 U.S.C. §§ 12131(2), 12132; 28 C.F.R. § 35.130(b)(7).

These disparate-effect and reasonable-accommodation requirements far exceed the minimal strictures of rational-basis review. To illustrate, look no further than the facts of these two cases. In his complaint, Mr. Ash acknowledges that his alleged disabilities "limit his ability to . . . work," J.A. 6, while Ms. Garrett likewise admits that her cancer "limits her ability to . . . work," J.A. 22. On these facts, a motion to dismiss an equal protection claim would be compelled. However difficult the factfinding and policy implications of an employment decision in this area, it is not difficult to conclude that an employer acts rationally — and therefore constitutionally — by refusing to promote or hire individuals

on the ground that they have a medical condition that "limits" their ability "to work." Yet it is precisely the objective of the ADA to regulate such employment decisions, to make them presumptively impermissible, and to allow them only when they can be justified by "necessity." In this respect, the ADA not only goes further than rational-basis review but also exceeds even the requirements of the Age Discrimination in Employment Act, which does not by its terms contain a disparate-effects test and which the Court has already found "is inconsistent with" and "significantly different" from "rational basis" review. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 421-22 (1985); *Kimel*, 120 S. Ct. at 647.

The ADA thus cannot be justified on the ground that it asks the States merely to do what the Equal Protection Clause already requires. Far from applying the same standards of care, the two mandates are worlds apart in their substantive rules, allocation of the burden of proof, system of adjudication and ultimate application. To respect the one standard of review invariably slights the other. As in *Kimel*, "[t]he Act, through its broad restriction on the use of [disability] as a discriminating factor, prohibits substantially more state employment [and public-access] decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard." *Id.* at 635.

III. THE ADA IS NOT "PROPER PROPHYLACTIC" LEGISLATION.

A. The ADA Does Not Respond To A "Predicate" Pattern Of Unconstitutional State Action.

"[P]roper prophylactic section 5 legislation" must fairly anticipate or "respond to a history of 'widespread and persisting deprivation of constitutional rights.'" *Florida Prepaid*, 522 U.S. at 645 (quoting *City of Boerne*, 521 U.S. at 526). *See Kimel*, 120 S. Ct. at 649 ("it is sufficient for these cases to note that Congress failed to identify a widespread

pattern of age discrimination by the States"). The ADA, however, does no such thing. Whether one considers *prior* equal protection violations or potential *future* ones, the congressional record is conspicuously silent in either direction.

Congress did not identify a pattern of prior State constitutional violations. A brief review of the text and legislative record of the ADA confirms that it does not even pretend to "respond" to State action, to say nothing of unconstitutional State action, but instead turns entirely on Article I policy concerns. One searches in vain for the "predicate unconstitutional conduct that Congress intended to remedy" by extending the ADA to the States in 1990. *Florida Prepaid*, 527 U.S. at 647.

The text of the ADA, to begin with, makes no mention of any pattern of State violations of the equal-protection rights of the disabled. Not one instance of such conduct is identified, whether in the findings and purpose section of the law or in any other Title of the Act.

The legislative record is no different. Far from reflecting State insensitivity to the equal-protection rights of their citizens, the legislative record of the ADA "acknowledg[es] that states are willing and able to respect [the employment and public-access] rights" of the disabled. *Florida Prepaid*, 527 U.S. at 640 (quotation omitted). At several instances during the hearings on the ADA, national legislators and others complimented State efforts in this area:

* "All but one State I believe now, at the most recent count, has some kind of disability rights protection." *Hearing Before the House Subcommittee on Employment Opportunities*, 100 Cong. 86 (June 17, 1987) (Barbara Hoffman, Esq., Coalition for Cancer Survivorship).

* "Forty-five States have very similar laws as the one we are trying to put on the books here in the Federal Government." *Id.* at 5 (Rep. Moakley).

* Stating that 35 States already have legislation prohibiting discrimination and promoting accessibility. *Hearing Before the House Subcommittee on Select Education*, 101 Cong. 8 (Aug. 28, 1989) (Rep. Bartlett).

* "[T]he fact is that many States already provide this protection. This bill enables the whole country to be governed under the same conditions as those States that have had the foresight to pass such legislation." *Hearing Before the House Subcommittees on Employment Opportunities and Select Education*, 101 Cong. 1 (Sept. 13, 1989) (Rep. Martinez).

* "Virtually all States prohibit unfair discrimination among persons of the same class and equal expectation of life. The ADA adopts this prohibition of discrimination." S. Rep. No. 101-116, at 84 (1989).

* "All states currently mandate accessibility in newly constructed state-owned public buildings . . . ." *Id.* at 92.

* "Federal action in this area should likewise recognize that States can act, and most have already acted, to protect the rights of persons with disabilities in ways tailored to each State's particular circumstances." *Hearing Before the Senate Subcommittee on the Handicapped*, 101 Cong. 196 (June 22, 1989) (Attorney General Richard Thornburgh).

* "A large majority of the states (45) prohibit this type of discrimination." *Hearing Before the House Subcommittee on Employment Opportunities*, 101 Cong. 16 (June 17, 1987) (Congressional Research

Service Survey) (also noting that just six States do not have a general prohibition against discrimination, but that five of those States have a policy of employing handicapped persons in State service) (including table of State statutes).

* "Every state has a law that, to some extent, regulates employment decisions based on disability." *Hearing Before the Senate Subcommittee on the Handicapped*, 101 Cong. 386 (May 9, 1989) (National Coalition of Cancer Survivorship).

In addition to recognizing the innumerable State laws designed to accommodate and protect the disabled, other legislators observed that the States had been leaders rather than recalcitrant followers in this area. As Representative Mario Biaggi testified: "It is a sad commentary on the Congress of the United States when you see so many states in the vanguard, who long since have established more humane policy in this area." *Hearing Before the House Subcommittee on Employment Opportunities*, 101 Cong. 7 (June 17, 1989). And Representative John Moakley echoed the point: "This is probably one of the few times where the States are so far out in front of the Federal Government, it's not funny." *Id.* at 5. Still others suggested that the ADA was modeled after State anti-discrimination laws. *See* 136 Cong. Rec. H2614 (daily ed. May 22, 1990) (Rep. Berman) ("States like California, Pennsylvania, New York, North Carolina, Massachusetts, Connecticut, Iowa, Illinois, and others have offered models on which many aspects of the ADA are based").

Why, then, did Congress extend the ADA to the States as opposed merely to making it applicable to private employers? To the extent Congress gave any explanation for the decision, it did not relate to remediating Fourteenth Amendment violations. One legislative concern was ensuring that public sector employees obtain the same protections that private sector employees receive. *See* 135 Cong. Rec. S4993 (daily

ed. May 9, 1989) ("The Americans With Disabilities Act applies to both the public sector and the private sector. It prohibits discrimination on the basis of disability in employment, public accommodations, transportation, and communications. Its goal is nothing less than to give every disabled American a fair share of the American dream.") (Sen. Kennedy); *Hearing Before the House Subcommittee on Surface Transportation*, 101 Cong. 304 (Sept. 26, 1989) (Rep. Rahall). Yet, as the Court has held, an effort to level the regulatory requirements applicable to public and private employers represents a Commerce Clause, not a Fourteenth Amendment, concern. *See Florida Prepaid*, 527 U.S. at 645-48 (goal of "plac[ing] States on the same footing as private parties" is a "proper Article I," not section 5, "concern[]").

Another concern was addressing a history of societal discrimination against the disabled. In its statement of legislative findings, Congress found that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination . . . continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2). The legislative history conveys similar concerns. *See, e.g., Hearing Before the House Subcommittee on Civil and Constitutional Rights*, 101 Cong. 418-19 (Oct. 12, 1989) (James Ellis, American Association on Mental Retardation). But a finding of "discrimination in the private sector is beside the point," *Kimel* makes clear, because it does not show unconstitutional "discrimination by the States." 120 S. Ct. at 649 (citation omitted); *see also Morrison,* 120 S. Ct. at 1757-58 (section 5 legislation "must necessarily be corrective in its character, adapted to counteract and redress the operation of such prohibited state laws or proceedings of [s]tate officers") (quoting *Civil Rights Cases*, 109 U.S. 3, 18 (1883)).

An additional concern was ensuring that State agencies not covered by the Rehabilitation Act (because they do not receive

Federal funding) be covered by a Federal disability law. *See, e.g., Hearing Before the House Committee on the Judiciary and Subcommittee on Civil and Constitutional* Rights, 101 Cong. 58 (Aug. 3, 1989) (Chai Feldblum, ACLU Legislative Counsel) (noting that most programs and activities of States are already covered by section 504 when Federal funds are received, but that Title II of the ADA will extend the same coverage to the rest of the State activities); *Hearing Before the House Subcommittees on Employment Opportunities and Select Education*, 101 Cong. 1 (Sept. 13, 1989) (Rep. Martinez) ("the fact is that many states already provide this protection. This bill enables the whole country to be governed under the same conditions as those states that have had the foresight to pass such legislation"). Again, however, these policy considerations at best represent Commerce Clause concerns, not indications that the States have been violating, or stand prepared to violate, the constitutional rights of their disabled citizens.

In a similar vein, other participants in the legislative debate expressed concern that the various State laws in this area did not contain all of the substantive requirements that the ADA contains. *Id.* at 18; *Hearing Before the House Subcommittee on Employment Opportunities,* 100 Cong. 55 (June 17, 1987) (Grace Powers Monaco, Esq.) (noting that most State laws do not include cancer as a handicap); *Hearing Before the Senate Subcommittee on the Handicapped and House Subcommittee on Select Education*, 100 Cong. 54 (Sept. 27, 1988) (Admiral James Watkins) (recommending that States amend their disability laws to prohibit discrimination against the disabled, including HIV infected persons and persons with AIDS). This explanation, though, reveals not a constitutional but a policy concern, and it is one at any rate that is amply satisfied by the unchallenged authority of Congress to extend the ADA's substantive provisions (though not its abrogation provision, *see* 42 U.S.C. § 12202) to State employers under the Commerce Clause.

Still others expressed diverse concerns about the importance of accommodating the disabled in view of the aging American population, *Hearing Before the House Subcommittee on Select Education*, 101 Cong. 36-37 (Oct. 6, 1989) (Janna Shishler), the fact that one disability or another ultimately affects every family if not every American, and the economic benefits of accommodating disabled individuals, *Hearing Before the House Subcommittees on Employment Opportunities and Select Education*, 101 Cong. 41 (Sept. 13, 1989) (Mark Donovan, Marriott Corporation) ("Accommodation is not a disability issue. Accommodation is an employment issue . . . ."); 136 Cong. Rec. H2276 (daily ed. May 15, 1990) (Rep. McDermott) ("The ADA will not just help the disabled. It will help everyone, by giving America's economy the full benefit of their productive energies and talents."); H.R. Rep. No. 101-485, at 43-45 (1990). These objectives, too, advance Commerce Clause goals, and at the same time confirm the parallels between Congress's extension of the ADEA to the States and its comparable decision to do so with regard to the ADA.

Nor does the legislative history reveal any discussion of what the Constitution requires in this area or how the ADA is designed to meet those requirements. To the extent Congress mentioned the constitutional rights of the disabled, it was to argue that the 43 million disabled individuals in this country (42 U.S.C. § 12101(a)(1)) should be treated as "a discrete and insular minority," 42 U.S.C. § 12101(a)(7), S. Rep. No. 101-116, at 15 (1989), H.R. Rep. No. 101-485, at 40 (1990), or should receive the same "civil rights protections that women and other minority groups have." *Hearing Before the House Committee on the Judiciary and Subcommittee on Civil and Constitutional Rights*, 101 Cong. 41 (Aug. 3, 1989) (James Brady, National Organization on Disability); *Hearing Before the House Subcommittee on Employment Opportunities*, 101 Cong. 3 (June 17, 1987) (Rep. Moakley).

> [The Court has] consigned cases involving disability discrimination to the level or 'tier' of judicial scrutiny least favorable to the individual who suffers the discrimination — the so-called 'rational basis' test. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). What this means in practical terms is that any halfway plausible rationalization for governmental discrimination against people with mental or physical disabilities will be enough to satisfy the Federal courts.

Hearing Before the House Committee on the Judiciary and Subcommittee on Civil and Constitutional Rights, 101 Cong. 422-23 (Oct. 12, 1989) (James Ellis, President, American Ass'n on Mental Retardation). While these disagreements over the appropriate constitutional scrutiny for disability discrimination may be permissible justifications for Commerce Clause legislation, they do not reflect the "specially informed *legislative* competence" that section 5 entrusts to Congress, *Katzenbach v. Morgan*, 384 U.S. 641, 656 (1966) (emphasis added), and disrespect the inter-branch imperative that "it is this Court's precedent," not Congress's view of that precedent, "which must control." *City of Boerne*, 521 U.S. at 536. "Congress does not enforce a constitutional right," it is by now clear, "by changing what the right is." *Id.* at 519.

Congress did not identify any threat of future State constitutional violations. Nor does the future look any more threatening than the past. To our knowledge, Congress nowhere expressed any such concern, whether in the text of the law or in the legislative record. Nor can any such threat be contrived today.

Besides being governed by democratically-elected officials sworn to uphold the Constitution of the United States, all 50 States have laws or administrative provisions restricting disability discrimination in employment and public access. *See* App. A. These provisions go beyond what the Constitution requires, they each apply generally to public

employees, and they each permit monetary relief. *See id.* Under these circumstances, only the most unusual sequence of events would allow a future constitutional violation to go unremedied. Consider the necessary prerequisites of such a development: (1) The State or Federal lower courts would have to deny relief on equal protection grounds; (2) this Court would have to deny relief on equal protection grounds; (3) the State courts would have to deny equal-protection relief under their own Constitution; (4) the States would have to deny judicial or administrative relief under their comprehensive State disability laws; (5) the State agency would have to deny, or be ineligible for, Federal funding (because otherwise the comparable injunctive and monetary remedies of the Rehabilitation Act would be available); (6) the States would have to decline to waive immunity to ADA claims in State court; (7) the Federal courts would have to deny *Ex parte Young* relief under the ADA in Federal court; (8) the Federal government would have to choose not to sue the State under the ADA for money damages in Federal court; and (9) the "Constitution['s] presum[ption] that . . . even improvident decisions will eventually be rectified by the democratic process," *Vance v. Bradley*, 440 U.S. 93 (1979), would have to fail. No doubt, anything can happen. But if it did under this sequence of events, State recalcitrance to the dictates of the Constitution would hardly be the reason.

All things considered, in "enacting the [ADA], Congress identified no pattern of [age discrimination] by the States, let alone a pattern of constitutional violations." *Florida Prepaid*, 527 U.S. at 640. And as in *Kimel*, "Congress's failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field." 120 S. Ct. at 650. Whether one looks backward in time or forward, in neither direction is there a congressionally-identified pattern of unconstitutional State action against the disabled. The only real evidence — evidence, incidentally, of

which Congress was made aware — was of States overprotecting the constitutional rights of the disabled, not undermining them. The legislative record, as in *Kimel*, *Morrison*, *Florida Prepaid* and *City of Boerne*, "contains no evidence that unremedied [disability discrimination] by States had become a problem of national import." *Florida Prepaid*, 527 U.S. at 640-41. The predicate of prophylactic section 5 legislation in short is missing, and for this reason alone the ADA's extra-constitutional requirements exceed Congress's Fourteenth Amendment authority.

Nor would such a decision "signal the end of the line for employees who find themselves subject to [disability] discrimination." *Kimel*, 120 S. Ct. at 650. All 50 States provide some form of remedy for such discrimination, and importantly all go much further — by enacting proactive measures that go well beyond protecting the bare minimums of constitutionality. *See* App. A.

B. The ADA Independently Fails The Proportionality Requirements Of Section 5.

Even if the condition of relevant State misconduct could somehow be established, the ADA would still exceed congressional power. The law is "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne*, 521 U.S. at 532.

The ADA's application to the States carries one hallmark after another of unvarnished policy-based legislation, as opposed to calibrated remedial legislation. For starters, the law's substantive provisions apply in equal measure to State and private employers, 42 U.S.C. §§ 12111(2), (5) and (7), 12131, 12132, even though the Fourteenth Amendment covers the former but not the latter. Above and beyond their separate oath to obey the Constitution, public employers accountable to the ballot box operate under different economic and social

pressures from private employers accountable to dividend-anxious shareholders. Worse, even though the substantive provisions of the ADA apply in equal measure to private employers, the remedial provisions do not. In particular, the Title II public-access provisions permit money-damages claims against the States, 42 U.S.C. § 12133, while the Title III public-access provisions applicable to private employers permit only injunctive relief when a private claimant brings the action. 42 U.S.C. § 12188(a)(1) and (b)(1)(B), 2(B).

This same differential treatment occurs with respect to public-access claims brought against the States as opposed to those brought against the Federal government. Under Title II, to repeat, Congress imposed money-damages remedies on the States. Yet the ADA does not even cover executive-branch agencies, and section 504 of the Rehabilitation Act, the counterpart to Title II of the ADA, does not do so either. *See* 29 U.S.C. § 794a(a)(2) (applicable only to "Federal providers" of assistance, not to executive-branch agencies generally); *Lane v. Pena*, 518 U.S. 187 (1996); *see also* 136 Cong. Rec. H2319 (daily ed. May 15, 1990) (Rep. Douglas) ("The gentleman is right, the Federal Government is the biggest employer in the United States. And guess who is specifically exempt from this law? The Federal Government — the U.S. Federal Government."). Surely the ADA cannot be deemed a proportionate response to alleged national discrimination against the disabled when the constitutional standard applies in equal measure to State and Federal employers, *see Bolling v. Sharpe*, 347 U.S. 497 (1954), but the effort to enforce that standard does not.

The "indiscriminate scope" of the ADA also confirms that it is anything but a proportionate response to an alleged constitutional problem. *Kimel*, 120 S. Ct. at 650. Title I applies to all State "job application procedures" as well as "the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and

privileges of employment." 42 U.S.C. § 12112(a). And Title II applies to all "services, programs, or activities" of any State or State agency. 42 U.S.C. § 12132. This exceedingly broad language leaves little if any State practice unaffected. While this coverage of virtually every State policy decision affecting the disabled might be justified in the context of a law that merely imposes remedies for constitutional violations, it hardly represents the kind of carefully-gauged response that this Court has required of the National Legislature when it imposes extra-constitutional requirements on the States. Because the law is so "expansive" in scope and is not "limit[ed] . . . to cases involving arguable constitutional violations," it cannot satisfy this Court's proportionality requirement. *Florida Prepaid*, 527 U.S. at 646.

Besides the virtually unlimited State policies and practices that the ADA covers, it also is of "indefinite" duration and is nationwide in application. *Florida Prepaid*, 527 U.S. at 647. The same defects doomed the ADEA, the Patent Remedy Act and the RFRA. Unlike the voting rights measures previously approved by the Court, moreover, the ADA does not require the legislature to assess in a remedial manner the progress States are making in curing or ending allegedly unconstitutional practices. *City of Boerne*, 521 U.S. at 532-33. Nor, unlike other voting rights measures, *see Katzenbach v. Morgan*, 384 U.S. 641, is the law "directed only to the State where the evil found by Congress existed." *Morrison*, 120 S. Ct. at 1759.

Above all else, however, "it simply cannot be said that 'many of [the state actions] affected by the congressional enactment have a significant likelihood of being unconstitutional.'" *Florida Prepaid*, 527 U.S. at 647 (quoting *City of Boerne*, 521 U.S. at 532). The rigorous standard of review applicable to an ADA action has no parallel to the forgiving standard that the Court applies to equal protection claims. What the Court said in *Kimel* applies with equal

conviction here: "The Act, through its broad restriction on the use of [disability] as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard." *Kimel*, 120 S. Ct. at 635.

ADA litigation contrasts with constitutional litigation at every turn:

(1) The ADA requires individualized case-by-case determinations as to whether a disabled employee is qualified for the job, 29 C.F.R. Part 1630, Appendix (Interpretive Guidance); *see also* Equal Employment Opportunity Commission, *A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans With Disabilities Act*, §§ 2.2(c), 3.7, 4.4, 4.5, 8.7, and 9.1, not "generalizations" based on physical and mental capacity, *Heller*, 509 U.S. at 312;

(2) the ADA places the burden of proof on States to justify their conduct, 42 U.S.C. §§ 12112(b)(5)(A), (b)(6), not the claimant, *Heller*, 509 U.S. at 319;

(3) the ADA presumptively bars consideration of disability in providing public services or in employing civil servants, but the Constitution permits "governmental consideration of those differences in the vast majority of situations," *City of Cleburne*, 473 U.S. at 444;

(4) the ADA prohibits any rule or practice that has a disparate impact unless the State can prove that it is "job-related" and "consistent with business necessity," 42 U.S.C. § 12112(b)(6), but the Constitution permits such rules that "'in practice . . . result[] in some inequality'" unless the attacking party can "negative every conceivable basis which might support it," and the courts must "accept a legislature's generalizations even when there is an imperfect fit between means and ends," *Heller*, 509 U.S. at 320-21 (quotation omitted);

(5) the ADA compels States to provide "reasonable accommodations" for disabled employees unless it "impose[s] an undue hardship," 42 U.S.C. § 12112(b)(5)(A), while the Constitution permits employment decisions based on disability so long as they are rationally based, *City of Cleburne*, 473 U.S. at 444;

(6) the ADA compels States to make "reasonable modifications" in their public services to accommodate the disabled unless they would "fundamentally alter" the nature of the program, 42 U.S.C. §§ 12131(2), 12132; 28 C.F.R. § 35.130(b)(7), *see Olmstead v. L.C.*, 119 S. Ct. 2176 (1999), while the Constitution contains no such requirement, *City of Cleburne*, 473 U.S. at 444;

(7) employment standards amount to impermissible conduct if they "have the effect of discrimination," 42 U.S.C. § 12112(b)(3)(A), or "tend to screen out" disabled individuals, 42 U.S.C. § 12112(b)(6), while the Constitution does not turn on such effects, *City of Cleburne*, 473 U.S. at 444;

(8) the ADA requires an objective justification in a court of law, 42 U.S.C. §§ 12111(10), 12112(b)(5)(A) & (6), 12113(a) and (b); 29 C.F.R. §§ 1630.2(p) and (r), 1630.9(a), 1630.15, not a "virtually unreviewable" justification (*Beach Communications*, 508 U.S. at 316) that could "reasonably be conceived to be true," *Bradley*, 440 U.S. at 111; and

(9) the ADA frequently requires proof that there is no acceptable alternative with less discriminatory impact, *see, e.g.*, 29 C.F.R. Part 1630, Appendix (Interpretive Guidance) Background ("[a]n accommodation must be tailored to match the needs of the disabled individual with the needs of the job's essential functions"); *id.* at § 1630.9 ("Once potential accommodations have been identified, the employer should assess the effectiveness of each potential accommodation in assisting the individual in need of the accommodation in the performance of the essential functions of the position.");

EEOC Technical Assistance Manual to Title I, §§ 4.4 (agility testing), and I (p.I-6) (direct threat); 28 C.F.R. § 35.130(b)(1)(ii) & (iii); U.S. Department of Justice, Technical Assistance Manual to Title II, § II-3.4400, not the recognition that the Court "'must disregard' the existence of alternative methods of furthering the objective" that might be "'preferred,'" *Heller*, 509 U.S. at 330 (quoting *Schweiker*, 450 U.S. at 235).

Far from being calibrated to correct rational-basis violations, the ADA borrows many of the same requirements associated with the heightened scrutiny applicable to discrimination claims based on race or gender. The law, in this respect and many others, represents an impermissibly disproportionate exercise of section 5 authority. As these outcome-dispositive distinctions make clear, Congress ultimately placed disability-based classifications, which are presumptively constitutional, on a par with race-based and gender-based classifications, which presumptively are not. As in *Kimel,* the ADA simply replaces one level of judicial scrutiny with another, and does so out of all proportion to any real or threatened constitutional wrongs. For this independent reason, the law exceeds Congress's section 5 authority.

IV. THE CONCLUSION THAT THE ADA EXCEEDS CONGRESSIONAL POWER FITS WELL WITHIN THE COURT'S SECTION 5 HOLDINGS, AND PRESERVES VITAL PRINCIPLES OF FEDERALISM.

Not just the language of this Court's section 5 precedents, but the holdings as well, establish that the ADA does not constitute proper enforcement legislation. Even with respect to the central evils addressed by the Civil War Amendments — race and voting — the Court has always required congressional authority in this area to be linked to actual or empirically-threatened violations of the underlying amendment. Common sense and logic ought to suffice to

reject the paradoxical exercise of a prophylactic power in an unprophylactic setting. But if not, precedent does. No holding of the Court supports the use of prophylactic authority under section 5 in the context of rights that warrant rational-basis review. And at least two decisions have rejected any such authority.

Thirty years ago, in *Oregon v. Mitchell*, 400 U.S. 112 (1970), the Court confirmed that Congress does not have "a substantive, non-remedial power under the Fourteenth Amendment," *City of Boerne*, 521 U.S. at 527, and did so in the context of a non-suspect classification regarding voting. A majority of the court concluded that Congress exceeded its section 5 authority in passing legislation designed to lower the voting age from 21 to 18 in State and local elections. *See Oregon*, 400 U.S. at 125 (Black, J., plurality opinion); *id.* at 154, 209 (Harlan, J., concurring/dissenting opinion); *id.* at 294, 296 (Stewart, J., concurring/dissenting opinion joined by Burger, C.J., and Blackmun, J.). In doing so, *Oregon* emphasized that "[t]he Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection. Nor was the Enforcement Clause of the Fourteenth Amendment intended to permit Congress to prohibit every discrimination between groups of people." *Id.* at 126-27 (citations omitted).

Just last Term, the Court adhered to this view in a case that is virtually identical to this one. In *Kimel*, the Court indicated that "[a]ge classifications, unlike governmental conduct based on race or gender, cannot be characterized as 'so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy.'" 120 S. Ct. at 645 (quoting *City of Cleburne*, 473 U.S. at 440). It therefore reiterated that classifications based on age receive rational-basis review, and accordingly that "a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the

State's legitimate interests," and may do so even though this proxy "is probably not true . . . in a majority of cases." *Id.* at 646-47 (quotation omitted). Against this backdrop, the Court concluded that the ADEA's attempted imposition of "heightened scrutiny" on State employers could not be sustained. *Id.* at 648. As a matter of logic and sheer common sense, a similar conclusion follows here. Not only do the same explanations for applying rational-basis review to classifications based on age apply to classifications based on disability, but the ADA's extra-constitutional requirements reach as far as, if not further than, those imposed by the ADEA. The absence of abrogation authority in the one rational-basis setting applies with equal force in the other.

Even outside the arena of non-suspect classifications, *City of Boerne*, *Florida Prepaid*, and *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), all invalidated legislation that did not respond to a pertinent record of constitutional violations and that was disproportionate to any alleged harm. While the defenders of RFRA, as here and as in *Florida Prepaid* and *College Savings*, argued that it was "a reasonable means of protecting the free exercise of religion," and was designed "[t]o avoid the difficulty of proving such violations," *City of Boerne*, 521 U.S. at 529, the Court nonetheless concluded that the law exceeded congressional power. The decision in the *Civil Rights Cases* is to the same effect, noting that section 5 "cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be . . . to make Congress take the place of the State legislatures and to supersede them." 109 U.S. at 13.

The Court's voting rights decisions all point in the same direction. They each involved patterns and practices of unconstitutional State action, and therefore properly allowed Congress to impose calibrated extra-constitutional require-

ments on the States. *See, e.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (law was enacted in response to "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution," and prior remedies had been "unsuccessful"); *Katzenbach v. Morgan*, 384 U.S. at 653-54 (literacy test ban "was merely legislation aimed at the elimination of an invidious discrimination in establishing voter qualifications"); *Ex parte Virginia*, 100 U.S. 339 (permitting civil rights legislation applied to a State trial court judge who excluded jurors on account of race); *Oregon*, 400 U.S. at 131-34 (literacy tests) (Black, J., plurality opinion) (noting "long history" of discriminatory use of literacy tests); *id.* at 216-17 (Harlan, J., concurring) (sufficient evidence of racial discrimination with literacy tests); *id.* at 282-84 (Stewart, J., concurring, joined by Blackmun, J. and Burger, C.J.) ("nationwide application may be reasonably thought appropriate when Congress acts against an evil such as racial discrimination which in varying degrees manifests itself in every part of the country"); *City of Rome v. United States*, 446 U.S. 156 (1980) (same).

In contrast, a decision upholding the prophylactic exercise of section 5 power in the context of rational-basis scrutiny, with no widespread practice of relevant constitutional violations to boot, would break new ground and do little "to allay lingering concerns about the extent of the national power." *Alden v. Maine*, 527 U.S. 706, 713-14 (1999). Such authority simply has no stopping point. Virtually any Federal law that is itself rational could fairly be said to curb the risk of irrational State lawmaking in the area. With respect to the "life, liberty and property" guarded by procedural due process, only self-restraint would stand in the way of the National government legislating a more appropriate "process" for State governments to follow. *Civil Rights Cases*, 109 U.S. at 13.

As for other rights incorporated through the due process clause, the risks may be even greater. What would prevent Congress from passing legislation regulating all encounters between State law enforcement and the citizenry in the name of protecting Fourth and Fifth Amendment rights? What would prevent property rights advocates from expanding this Court's "regulatory takings" case law? *See Penn Central Transp. Co. v. New York*, 438 U.S. 104 (1978). What would prevent Federal laws nationalizing a system of punishment in the name of protecting Eighth Amendment rights? And what would prevent the federalization of education, marriage and family laws in the name of protecting privacy and other substantive due process guarantees? Many questions linger here, and the answers to all of them counsel against accepting the invitation to start down this precipitous path.

CONCLUSION

For the foregoing reasons, the State of Alabama respectfully urges the Court to hold that the States retain the right to waive their immunity from suit under the ADA and that Congress has not permissibly abrogated it for them.

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APPENDIX

Appendix A

	ALABAMA	ALASKA
Prohibits employment discrimination based upon disability	Ala. Admin. Code r. 670-x-4-.01*	Alaska Stat. § 18.80.220
Applicable to the State and other public employers	Ala. Admin. Code r. 670-x-4-.01	§ 18.80.300(4), (16)
Applicable to the State pre-1990**	Ala. Admin. Code r. 670-x-4-.01 (1981)	§§ 18.80.220, 18.80.300(4), (16) (1975)
Equitable and monetary remedies available	Ala. Admin. Code r. 670-x-4-.03	§§ 22.10.020(i), 18.80.130
State policies advancing the hiring of persons with disabilities	Ala. Code § 21-7-8 (1975), § 21-5-1(1965), § 36-26-16	§§ 18.80.200 (1987), 23.15.220 (1960)
State policies requiring accessibility and accommodation	§§ 21-4-1 (1965), 21-7-2, 21-7-3 (1975)	§§ 35.10.015 (1966), 11.76.130 (1987), 18.80.230 (1965)
State policies favoring de-institutionalization	§§ 22-52-37 (a)(7) (1975), 38-9-6(c) (1977), 22-52-10.1 (1977)	§ 47.30.735(d) (1981)

*Applies to state employees only.

** Date indicated is the year the law both applied to the State and prohibited discrimination on the basis of disability.

	ARIZONA	ARKANSAS
Prohibits employment discrimination based upon disability	Ariz. Rev. Stat. § 41-1463.B1	Ark. Code § 16-123-107(a)(1); Exec. Order 93-1 (1993)
Applicable to the State and other public employers	§§ 41-1461.2, -1461.6	Exec. Order 93-1 (1993)
Applicable to the State pre-1990	§§ 41-1463.B1, 41-1461.2, -1461.6 (1985)	Exec. Order 86-1 (1985) (voluntary enforcement)
Equitable and monetary remedies available	§ 41-1481.D, .G	§§ 16-123-107(c), 19-10-208; Exec. Order 93-1 (1993)
State policies advancing the hiring of persons with disabilities	Exec. Order 89-7 (1989), 92-2 (1992)	§ 20-14-301(b) (1973); § 22-3-1303 (1969)
State policies requiring accessibility and accommodation	§§ 41-1492.01 (1967), 11-1024 (1965)	§§ 27-15-301, -306 (1985), 20-14-303 (1973)
State policies favoring de-institutionalization	§ 36-540.B (1983)	§ 20-47-214(c) (1979)

	CALIFORNIA	COLORADO
Prohibits employment discrimination based upon disability	Calif. Gov't Code § 12940(a)	Colo. Rev. Stat. § 24-34-402(1)(a)-(b)
Applicable to the State and other public employers	§ 12926(d)	§ 24-34-401(3)
Applicable to the State pre-1990	§§ 12940(a), 12926(d) (1973)	§§ 24-34-402(1)(a)-(b), 24-34-401(3) (1977)
Equitable and monetary remedies available	§ 12960; 22 Cal. 4th 147, 166-167 (2000)	§§ 24-34-306, 24-34-405
State policies advancing the hiring of persons with disabilities	§§ 19230, 19232 (1977); Calif. Educ. Code § 44100 (1977)	§§ 24-34-801 (1979), 26-8-105(d) (1963)
State policies requiring accessibility and accommodation	Gov't Code §§ 4450 (1968), 4450.5 (1984); Calif. Civ. Code §§ 54, 54.1 (1968), 51 (1905)	§§ 9-5-101 to -104 (1965), 24-34-801 (1971), 24-34-601 (1971)
State policies favoring de-institutionalization	Calif. Welf. & Inst. Code §§ 5354 (1967), 5325.1 (1978)	§§ 27-10-101 (1973), 27-10.5-101 (1975)

	CONNECTICUT*	DELAWARE
Prohibits employment discrimination based upon disability	Conn. Gen. Stat. § 46a-60(1)	Del. Code Title 19, § 724
Applicable to the State and other public employers	§§ 46a-51(10), 46a-69 to -78	§ 722(2)
Applicable to the State pre-1990	§§ 46a-60(1), 46a-51(10); former §§ 4-61c to 4-61k (1973)	§§ 724, 722(2) (1987)
Equitable and monetary remedies available	§ 46a-86(b)	§ 712(j),(k), and (g)
State policies advancing the hiring of persons with disabilities	§§ 46a-7 (1977), 46a-70(a) (1973), 31-136 (1957), 46a-70(b)-(c) (1973), 31-138 (1957)	Title 19 § 721 (1987); Title 16 § 9501(b) (1953)
State policies requiring accessibility and accommodation	§§ 29-269 (1967), 29-271 (1975); § 46a-64 (1973)	Title 29 §§ 7301 to 7306; Title 16 § 9502 (1971); Title 6 § 4504
State policies favoring de-institutionalization	§ 17a-498(c) (orig. § 17-178(c) (1976))	Title 16 § 5010 (1975)

*Conn. Const. Art. I, § 20 prohibits denial of equal protection of laws, discrimination and segregation based on physical or mental disability.

	FLORIDA	GEORGIA
Prohibits employment discrimination based upon disability	Fla. Stat. §§ 760.10, 110.105(2), 110.233(1)	Ga. Code §§ 34-6A-4, 45-19-29
Applicable to the State and other public employers	§§ 760.02(6)-(7), 110.233(1), 110.105(2) (1977)	§§ 34-6A-2(2), 45-19-22(5) (1978)
Applicable to the State pre-1990	§§ 110.105(2), 760.10, 760.02(6)-(7), 110.233(1) (1977)	§§ 34-6A-4, 34-6A-2(2), 45-19-29, 45-19-22(5) (1978)
Equitable and monetary remedies available	§§ 760.07, 760.11(5)	§§ 34-6A-6, 45-19-38
State policies advancing the hiring of persons with disabilities	§ 413.08(3) (1971), § 413.393(1)(i) (1994)	§ 30-1-2 (1975)
State policies requiring accessibility and accommodation	§ 553.503 (1974 (*see former* § 553.46)); § 413.08 (1949)	§§ 30-3-3 (1984), 30-4-1 (1955)
State policies favoring de-institutionalization	§ 394.467(1)(b) (1982)	§ 37-3-162(a) (*see also* § 88-502.4 (1978))

	HAWAII	IDAHO
Prohibits employment discrimination based upon disability	Haw. Rev. Stat. §§ 78-2, 378-2(1)(A)	Idaho Code § 67-5909(1)
Applicable to the State and other public employers	§ 78-2, 378-1	§ 67-5902(6)(b)
Applicable to the State pre-1990	§§ 378(2), 378-1, 78-2 (1980)	§§ 67-5909(1), 67-5902(6)(b) (1988)
Equitable and monetary remedies available	§ 378-5(b)	§§ 67-5907, 67-5908
State policies advancing the hiring of persons with disabilities	§§ 78-2 (1967)	§ 56-707(1) (1969)
State policies requiring accessibility and accommodation	§§ 103-50 (1965), 347-13 (1945), 489-3 (1986)	§§ 39-3201 to -3210 (1967), 56-702 (1969), 56-703 (1969)
State policies favoring de-institutionalization	§ 334-60.2(3) (orig. § 334-60 (1976))	§ 66-329(k)(2) (1981)

	ILLINOIS*	INDIANA
Prohibits employment discrimination based upon disability	775 Ill. Comp. Stat. §§ 5/1-103(Q), 5/2-102(A)	Ind. Code § 22-9-5-19
Applicable to the State and other public employers	§§ 5/1-103(L)	§§ 22-9-5-10, 22-9-5-15
Applicable to the State pre-1990	§§ 5/1-103(L), (Q) (1979)	§§ 22-9-1-3 (1975)
Equitable and monetary remedies available	§ 5/8A-104	§§ 22-9-1-6(l), 22-9-1-17
State policies advancing the hiring of persons with disabilities	§§ 30/5 (1969), 5/1-102(A) (1980), 5/1-102(F)-(G) (1980); 20 Ill. Comp. Stat. § 415/19a (1955), § 4007/1 (1992)	§§ 16-32-3-1 (1969), 16-32-3-5 (1969), 22-9-1-2 (1975), 4-15-12-2 (1977)
State policies requiring accessibility and accommodation	410 Ill. Comp. Stat. § 2511 (1985); 775 Ill. Comp. Stat. §§ 30/3 (1969), 5/5-102 (1986)	§§ 22-13-4-1(1) (1987), 16-32-3-1 (1969)
State policies favoring de-institutionalization	405 Ill. Comp. Stat. § 5/3-811 (1979)	§ 12-26-6-8 (orig. 16-14-9.1-9 (1975))

*Ill. Const. Art. I, § 19 prohibits employment discrimination against persons with physical or mental disabilities.

	IOWA	KANSAS
Prohibits employment discrimination based upon disability	Iowa Code § 216.6(1)(a)	Kan. Stat. § 44-1009(1)
Applicable to the State and other public employers	§ 216.2(7), (11)	§ 44-1002(b)
Applicable to the State pre-1990	§§ 216.2(7), (11), 216.6 (1)(a) (1972)	§§ 44-1002(b), 44-1009(1) (1974)
Equitable and monetary remedies available	§§ 216.15, 216.16	§§ 44-1011, 44-1005(k)
State policies advancing the hiring of persons with disabilities	§§ 216C.2 (1967), 216C.1 (1967), 19B.2 (1986), 19B.11 (1986)	§§ 39-1105 (1969), 44-1001 (1974)
State policies requiring accessibility and accommodation	§§ 104A (1965), 216C.3 (1959), 213C.1, 213C.4 (1967), 216.7 (1972)	§§ 58-1301 (1968), 39-1101 (1969), 44-1009(c) (1974)
State policies favoring de-institutionalization	§§ 229.14(3) (1975), 225C.14 (1981)	§ 59-2966 (orig. § 59-2917(f) (1976)); § 39-1603 (1990)

	KENTUCKY	LOUISIANA*
Prohibits employment discrimination based upon disability	Ky. Rev. Stat. §§ 207.150, 344.040	La. Rev. Stat. § 23:323(A)-(B)
Applicable to the State and other public employers	§§ 207.130 (1), (3); 344.010, 344.030(2)	§ 23:302(2)
Applicable to the State pre-1990	§§ 207.150, 207.130(1), (3) (1976)	§§ 46:2254(B)-(E), 46:2253 (1980)
Equitable and monetary remedies available	§§ 207.210(3), (4), 344.230, 344.240, 344.450	§ 23:303
State policies advancing the hiring of persons with disabilities	§§ 344.020(1) (b) (1992), 12.450 to 12.465 (1996)	§ 51:2231.A (1992)
State policies requiring accessibility and accommodation	§§ 198B.260 (1980), 258.500 (1966)	§§ 40:1731 to 1743 (1977), 46:1953 (1975), 49:146 (1987)
State policies favoring de-institutionalization	§ 202A.026 (1982)	§ 28:55.E(1) (1977)

*La. Const. Art. I, § 12 prohibits public accommodations and public areas from discriminating based on physical condition.

	MAINE	MARYLAND
Prohibits employment discrimination based upon disability	Me. Rev. Stat. Title 5 § 4572.1	Md. Ann. Code Art. 49B § 16
Applicable to the State and other public employers	§ 4553.4, .7	§§ 7, 15(b), 17A
Applicable to the State pre-1990	§§ 4572.1, 4553.4, .7 (1973)	§§ 7, 15(b), 16 (1974)
Equitable and monetary remedies available	§§ 4612, 4613	§ 11(e)
State policies advancing the hiring of persons with disabilities	Title 26 § 2006.5-C (1969)	Art. 30 § 33 (1966)
State policies requiring accessibility and accommodation	Title 5 §§ 4593 to 4595 (1973); Title 17 § 1312 (1971); Title 25 § 2701 (1967)	Md. Code Ann, State Fin. & Proc. § 2-509 (1985); Md. Ann. Code art. 83B § 6-102 (1974), art. 30 § 33 (1966), art. 49B § 5 (1974)
State policies favoring de-institutionalization	Title 34-B § 3864.5.E(2) (1983)	Md. Health-Gen. § 10-632 (e)(2)(v) (1982)

	MASSACHUSETTS*	MICHIGAN
Prohibits employment discrimination based upon disability	Mass. Gen. Laws ch. 151B § 4(16)	Mich. Comp. Laws §§ 37.1102, 37.1202
Applicable to the State and other public employers	§ 1(5)	§§ 37.1103(g), 37.1201(b)
Applicable to the State pre-1990	§§ 1(5), 4(16) (1983)	§§ 37.1102, 37.1103(g), 37.1202 (1976)
Equitable and monetary remedies available	§§ 5, 6	§§ 37.1606, 37.2605
State policies advancing the hiring of persons with disabilities	ch. 6 § 105-106 (1958)	Exec. Order No. 1994-16 (May 23, 1994)
State policies requiring accessibility and accommodation	ch. 22 § 13A (1967); ch. 143 § 3W (1973); ch. 272 §§ 92A, 98 (1975)	§§ 125.1351 to 1356 (1966), 37.1302 (1976), 37.1102 (1976)
State policies favoring de-institutionalization	ch. 123 § 8 (1978)	§ 330.1469a (1974)

*Mass. Const. Amendment Art. 114 prohibits discrimination against persons with disabilities in a program or activity within the Commonwealth.

	MINNESOTA	MISSISSIPPI
Prohibits employment discrimination based upon disability	Minn. Stat. § 363.03	Miss. Code § 25-9-149*
Applicable to the State and other public employers	§ 363.01(17), (28)	§ 25-9-149
Applicable to the State pre-1990	§§ 363.03, 363.01 (1973)	§ 25-9-149 (1984)
Equitable and monetary remedies available	§ 363.071	§§ 25-9-131, 25-9-132
State policies advancing the hiring of persons with disabilities	§ 256C.01 (1969), § 116J.874	§ 43-6-15 (1974)
State policies requiring accessibility and accommodation	§§ 471.465 to .468 (1971), 256C.02 (1969), 363.03 (1975)	§§ 43-6-101 to -124 (1972), 43-6-5 (1972)
State policies favoring de-institutionalization	§ 253B.09 (1982)	§ 41-21-73(4) (orig. § 41-21-75 (1975))

*Only applicable to persons seeking public employment.

	MISSOURI	MONTANA
Prohibits employment discrimination based upon disability	Mo. Rev. Stat. § 213.055(1)	Mont. Code §§ 49-2-303, 49-4-101, 49-3-201
Applicable to the State and other public employers	§ 213.010(7)	§ 49-3-201
Applicable to the State pre-1990	§§ 213.010(7), 213.055(1) (1978)	§ 49-3-201 (1975)
Equitable and monetary remedies available	§ 213.076	§§ 49-2-506(b), 49-4-102, 49-3-309(b)
State policies advancing the hiring of persons with disabilities	§§ 209.180 (1977), 286.200 (1977)	§§ 49-4-202 (1971), 49-3-202 (1975), 39-30-101 to 102, -106 (1983); Mont. Admin. R. §§ 2.21.1412 to .1414 (1984)
State policies requiring accessibility and accommodation	§§ 8.610 to .657 (1967), 209.150 (1941), 213.065 (1986)	Mont. Code §§ 50-60-201(4) (1969), 49-4-211 (1971), 49-2-304 (1974)
State policies favoring de-institutionalization	§ 632.335.4 (1980)	§ 53-21-127 (1975)

	NEBRASKA	NEVADA
Prohibits employment discrimination based upon disability	Neb. Rev. Stat. §§ 48-1104, 48-1107.02	Nev. Rev. Stat. §§ 281.370, 613.330
Applicable to the State and other public employers	§§ 48-1102(2), 48-1126	§§ 281.370, 613.310(2), (5)
Applicable to the State pre-1990	§§ 48-1104, 48-1102(2) (1979)	§§ 281.370, 613.330, 613.310(2), (5) (1971)
Equitable and monetary remedies available	§ 48-1119(4)	§§ 613.405, 613.420, 613.430, 233.170, 233.180
State policies advancing the hiring of persons with disabilities	§ 20-131 (1971)	§ 284.012 (1969)
State policies requiring accessibility and accommodation	§§ 81-5,147 (1974), 20-127 (1971), 20-129 (1971)	§§ 338.180 (1973), 651.070 (1969)
State policies favoring de-institutionalization	§ 83-1037 (1976)	§ 433A.310.3 (1975)

	NEW HAMPSHIRE	NEW JERSEY
Prohibits employment discrimination based upon disability	N.H. Rev. Stat. § 354-A:7	N.J. Stat. Title 10 §§ 5-4.1, 5-12, 5-29.1
Applicable to the State and other public employers	§ 354-A:2(VII)	§ 5-5.e
Applicable to the State pre-1990	§§ 354-A:2, 354-A:7 (1975)	§§ 5-4.1, 5-12, 5-29.1 (1972)
Equitable and monetary remedies available	§ 354-A:22	§ 5-13
State policies advancing the hiring of persons with disabilities	§ 167-C:5 (1971)	§§ 30:6-17 (1964), 30:6-23 (1982), 11A:7-1 (1986)
State policies requiring accessibility and accommodation	§§ 275-C:14 (1977), 167-C:2 (1971), 155:39-b (1990)	§§ 52:32-4 to -5 (1971), 10:5-4 (1972), 10:5-29 (1971)
State policies favoring de-institutionalization	§§ 135-C:57 (1986), 135C:40(v) (1975)	§§ 30:4-24.2(e) (1975), 30:4-27.11(e)(b) (1991), 30:6D-9 (1977)

	NEW MEXICO	NEW YORK
Prohibits employment discrimination based upon disability	N.M. Stat. § 28-1-7	N.Y. Exec. Law § 296; N.Y. Civ. Serv. Law § 55
Applicable to the State and other public employers	§ 28-1-2.A to .B	N.Y. Exec. Law § 292;* N.Y. Civ. Serv. Law § 55
Applicable to the State pre-1990	§§ 28-1-7, 28-1-2.A to .B (1973)	N.Y. Exec. Law §§ 292, 296; N.Y. Civ. Serv. Law § 55 (1974)
Equitable and monetary remedies available	§ 28-1-10.J	N.Y. Exec. Law § 297(4)(c), (6), (9)
State policies advancing the hiring of persons with disabilities	§§ 28-7-7 (1967), 28-10-11 (1969), 28-10-1, 28-10-2 (1973)	N.Y. Ct. Rules § 25.16 L. 1988 c. 261 § 62 (1988); N.Y. Civ. Serv. Law § 55-b (1977)

**See Matter of Bd. of Higher Educ. v. Carter*, 14 N.Y.2d 138, 147 (1964).

	NEW MEXICO	NEW YORK
State policies requiring accessibility and accommodation	§§ 60-13-44(D) (1967), 28-7-3 (1967), 28-1-7(F) (1973)	N.Y. Pub. Bldgs. Law §§ 50, 51 (1972); N.Y. Exec. Law § 296(2) and (2-a) (1974); N.Y. Civ. Rights Law § 47 (1976)
State policies favoring de-institutionalization	§ 43-1-11(c)(3) (1977)	N.Y. Mental Hygiene Law § 9.27(d) (orig. § 31.27) (1972)

	NORTH CAROLINA	NORTH DAKOTA
Prohibits employment discrimination based upon disability	N.C. Gen. Stat. §§ 126-16, 168A-5	N.D. Cent. Code § 14-02.4-03
Applicable to the State and other public employers	§§ 126-16, 168A-3(2),(7)	§§ 14-02.4-02.6, 14-02.4-02.11
Applicable to the State pre-1990	§§ 168A-3(2),(7), 168A-5 (1985)	§§ 14-02.4-03, 14-02.4-02.6 (1983)
Equitable and monetary remedies available	§§ 126-37, 168A-11	§§ 14-02.4-19 to -20
State policies advancing the hiring of persons with disabilities	§§ 143-422.2 (1977), 128-15.3 (1971), 168A-2 (1985), 128-15.3 (1971), 143B-403.1 to 403.2 (1977)	§ 25-13-05 (1967)
State policies requiring accessibility and accommodation	§§ 168-2 (1973), 168-3 (1973), 168A-6 (1985)	§§ 14-02.4-14 (1983), 25-13-02 (1967), 48-02-19 (1973)
State policies favoring de-institutionalization	§ 122C-271 (1973)	§ 25-03.1-17 (1977)

	OHIO	OKLAHOMA
Prohibits employment discrimination based upon disability	Ohio Rev. Code § 4112.02	Okla. Stat. Title 25 § 1302, 74 § 840-2.9.A
Applicable to the State and other public employers	§§ 4112.01(A) (1)-(2)	25 § 1301.1; 74 § 840-2.9.A
Applicable to the State pre-1990	§ 4112.01, .02 (1976)	25 §§ 1301.1, 1302; 74 § 840-2.9.A (1981)
Equitable and monetary remedies available	§ 4112.02(N)	25 § 1901
State policies advancing the hiring of persons with disabilities	§§ 3304.38 (1996), 124.231(C) (1978)	74 § 9.30 (1957)
State policies requiring accessibility and accommodation	§§ 3781.111 (1965), 4112.02 (1976)	61 § 11 (1965); 7 § 19.1 (1968); 25 § 1402 (1985)
State policies favoring de-institutionalization	§ 5122.15(E) (1977)	43A, § 5-416 (orig 54.9(A), § 405(B)(1) (1980))

	OREGON	PENNSYL-VANIA
Prohibits employment discrimination based upon disability	Or. Rev. Stat. § 659.436	43 Pa. Cons. Stat. § 955
Applicable to the State and other public employers	§§ 659.400(4), 659.010(6)	§ 954(b)
Applicable to the State pre-1990	§ 659.425 (renumbered in 1997) (1973)	§§ 955, 954(b) (1974)
Equitable and monetary remedies available	§§ 659.050 to .070	§§ 962(c), 959
State policies advancing the hiring of persons with disabilities	§§ 182.100 (1981), 410.710 (1989), 659.020 (1983), 659.025(2) (1981), 659.405 (1973)	§ 952 (1974), 62 Pa. Cons. Stat. § 3207(d) (1994)
State policies requiring accessibility and accommodation	§§ 447.210 to 310 (1971), 346.610 to 660 (1967), 659.425(3) (1973)	71 Pa. Cons. Stat. §§ 1455.1 to 1455.3b (1965); 43 Pa. Cons. Stat. § 955(i) (1974)
State policies favoring de-institutionalization	§§ 427.031 (1979), 427.007 (1981)	50 § 7304(f) (1976)

	RHODE ISLAND*	SOUTH CAROLINA
Prohibits employment discrimination based upon disability	R.I. Gen. Laws §§ 28-5-7, 36-4-50	S.C. Code §§ 1-13-80(A), 1-13-85
Applicable to the State and other public employers	§§ 28-5-6(6)(i), 36-4-50	§§ 1-13-30 (d),(e)
Applicable to the State pre-1990	§§ 28-5-7, 28-5-6(6)(i) (1973)	§§ 1-13-80(A), 1-13-30(d)-(e) (1983)
Equitable and monetary remedies available	§ 28-5-24	§§ 1-13-90(c)(16), 1-13-90(d)(9)
State policies advancing the hiring of persons with disabilities	§§ 28-5.1-9 (1988), 25-2-13 (1971), 42-51-1 to 42-51-10 (1970)	§ 43-33-60 (1962)
State policies requiring accessibility and accommodation	§§ 37-8-15 (1964), 40-9.1-1 (1975), 42-87-2 (1983)	§§ 10-5-250 to 10-5-320 (1962), 10-5-330 (1983), 43-33-20 (1962), 43-33-10 (1962), 43-33-530 (1983)
State policies favoring de-institutionalization	§ 40.1-5-8(j) (orig. § 40.1-5-8(10)) (1974)	§§ 44-20-20 (1990), 44-20-390 (1990)

*R.I. Const. Art. I, § 2 prohibits State entities and those doing business in the State from discriminating against an otherwise qualified person solely based on disability.

	SOUTH DAKOTA	TENNESSEE
Prohibits employment discrimination based upon disability	S.D. Laws Codified §§ 20-13-10, 20-13-23.7, 20-13-10.1, 3-6A-15	Tenn. Code § 8-50-103(a)
Applicable to the State and other public employers	§§ 20-13-1(7), (11), 3-6A-15	§ 8-50-103(a)
Applicable to the State pre-1990	§§ 20-13-10, 20-13-1(7) (1986)	§ 8-50-103(a) (1976)
Equitable and monetary remedies available	§ 20-13-35.1	§§ 4-21-311, 8-50-103(b)(2)
State policies advancing the hiring of persons with disabilities	§§ 20-13-23.7 (1986), 60-7-2 (1967)	§§ 71-4-202 (1972), 8-50-104 (1976)
State policies requiring accessibility and accommodation	§§ 5-14-12 to 14 (1965), 9-46-1.2 (1975), 20-13-23.2 (1976), 20-13-23 (1986)	§§ 68-120-201 to 205 (1970), 62-7-112 (1955)
State policies favoring de-institutionalization	§ 27A-10-9.1 (1991); *former* §§ 27A-9-16.1 (1981), 27A-12-3.6 (1975)	§ 33-6-104(b) (orig. § 33-604(a)) (1976)

	TEXAS	UTAH
Prohibits employment discrimination based upon disability	Tex. Lab. Code § 21.051	Utah Code § 34A-5-106
Applicable to the State and other public employers	§ 21.002(8)(D)	§ 34A-5-102(8)(a)
Applicable to the State pre-1990	§§ 21.051, 21.002 (1983)	§§ 34A-5-102, 34A-5-106 (1979)
Equitable and monetary remedies available	§ 21.258	§ 34A-5-107(A)
State policies advancing the hiring of persons with disabilities	Tex. Hum. Res. §§ 122.001 (1975),121.003, 121.001 (1979)	§§ 26-30-3 (1981), 53A-24-114 (1995)
State policies requiring accessibility and accommodation	Rev. Civ. Stat. Ann. art. 9102 (1979); Hum. Res. Code § 121.003 (1979)	§§ 26-29-1 to 4 (1981), 26-30-1 (1981)
State policies favoring de-institutionalization	Tex. Health & Safety Code § 574.036(d) (1983)	§ 62A-12-234(10)(d) (orig § 64-7-36(10)(d)) (1975)

	VERMONT	VIRGINIA
Prohibits employment discrimination based upon disability	Vt. Stat. 21 § 495(a)(1)	Va. Code §§ 51.5-41.A, 2.1-716, 2.1-116.06
Applicable to the State and other public employers	§ 495d(1)	§§ 51.5-41.A, 2.1-116.06
Applicable to the State pre-1990	§§ 495, 495d (1981)	§§ 51.5-41.A, 2.1-716 (1985)
Equitable and monetary remedies available	§ 495b(b)	§§ 51.5-46, 2.1-116.07.B
State policies advancing the hiring of persons with disabilities	Title 21 §§ 497 (1963), 497a (1963)	§§ 2.1-715 (1987), 2.1-116.10 (1979), 51.5-41.B (1972), 2.1-116.14 (1979)
State policies requiring accessibility and accommodation	Title 21 §§ 273-276 (1987); Title 9 § 4502 (b)-(c) (1987)	§§ 2.1-516 (1970), 51.5-44 (1972); 2.1-715 (1987)
State policies favoring de-institutionalization	Title 18 § 7617(c) (1977)	§ 37.1-67.3 (1976)

	WASHINGTON	WEST VIRGINIA
Prohibits employment discrimination based upon disability	Wash. Rev. Code § 49.60.180	W.Va. Code § 5-11-9
Applicable to the State and other public employers	§ 49.60.040(1), (3)	§ 5-11-3(d)
Applicable to the State pre-1990	§§ 49.60.180, 49.60.040(1), (3) (1973)	§§ 5-11-9, 5-11-3(d) (1973)
Equitable and monetary remedies available	§ 49.60.250	§§ 5-11-13(b), (c)
State policies advancing the hiring of persons with disabilities	§§ 70.84.080 (1969), 70.84.010 (1969), 49.60.010 (1973), 50.12.250 (1987)	§§ 5-15-7 (1969), 5A-3A-1 (1990)
State policies requiring accessibility and accommodation	§§ 19.27.031(5) (1985), 70.92.110 (1975), 70.84.010 (1969)	§§ 5-11-2 (1981), 5-15-4 (1969), 5-11-9(6) (1973)
State policies favoring de-institutionalization	§§ 71.05.320 (1973), 17.24.015 (1989)	§§ 27-5-3(a) (1979), 7-5-4(j)(2) (1979)

	WISCONSIN	WYOMING
Prohibits employment discrimination based upon disability	Wis. Stat. §§ 111.321-.322, 111.34	Wyo. Stat. § 27-9-105(a)
Applicable to the State and other public employers	§ 111.32(6)(a)	§ 27-9-102(b)
Applicable to the State pre-1990	§§ 111.321-.322, 111.32(6)(a), 111.34 (1965)	§§ 27-9-102(b), 27-9-105(a) (1985)
Equitable and monetary remedies available	§ 111.39(c)	§ 27-9-106(g)
State policies advancing the hiring of persons with disabilities	§ 230.01(2) (1977); 1989 Act 345 § 1 (1989); Wis. Admin. Code ER-MRS 27.03(1), 27.04(1), 27.05(1) (1988)	§§ 27-1-110 to -111(1967), 9-2-115 (1965)
State policies requiring accessibility and accommodation	§§ 101.13 (1963), 346.503 (1981), 174.056 (1967)	§§ 16-6-501 to 504 (1969), 35-13-201 (1967)
State policies favoring de-institutionalization	§ 51.20(13)(c) (1975)	§ 25-10-110(j) (1981)

Appendix B

Current Alabama Programs, Laws and Policies To Promote, Assist and Protect Persons with Disabilities

POLICIES FAVORING EMPLOYMENT OF PERSONS WITH DISABILITIES

- "It is the policy of [the State of Alabama] to encourage and enable the blind, the visually handicapped and the otherwise physically disabled to participate fully in the social and economic life of the state and to engage in remunerative employment." Act of Oct. 7, 1975, No. 869, § 1, 1975 Ala. Acts 1711, 1711, codified at ALA. CODE § 21-7-1 (1997); *see generally* ALA. CODE §§ 21-7-1 to 10 (1997).

- Alabama residents with disabilities are entitled to preferential treatment in hiring for State employment under the State Merit System. Act of Sept. 30, 1965, No. 119, 1965 Ala. Acts., 2d Ex. Sess. 166, codified at ALA. CODE § 36-26-16 (1991).

- Equitable and monetary remedies are available to persons with disabilities in the state service who experience employment discrimination. ALA. ADMIN. CODE r. 670-x-4-.01, .03 (1981).

- The Governor's Committee on Employment of the Handicapped promotes "the employment of the physically mentally, emotionally, and otherwise handicapped citizens of Alabama." Act of Aug. 10, 1965, No. 226, §1, 1965 Ala. Acts 323, 323, codified at ALA. CODE § 21-5-1 (1975); *see generally* ALA. CODE §§ 21-5-1 to 10 (1997) (establishing duties, composition, and authority of Committee).

- It is the public policy of the State of Alabama to employ

persons with disabilities in the state service, including state agencies and departments, "on the same terms and conditions as the able-bodied." ALA. CODE § 21-7-8 (1997).

- A blind-vendor program gives preference to blind persons for the operation of vending stands in all state-owned or leased properties. *See* ALA. CODE §§ 21-1-40 to 41 (1997).

- It is the policy of the University of Alabama at Birmingham to recruit, hire, and promote all faculty and staff without regard to race, color, religion, sex, national origin, disability unrelated to job performance, disabled veteran status, or Vietnam era veteran status. Office of Human Resource Management, University of Ala. at Birmingham, *Equal Opportunity Policy* (Aug. 2, 1993, rev. Jan. 31, 1996 & Nov. 17, 1999).

- It is the policy of the University of Alabama at Birmingham to "make[] an affirmative effort to hire individuals with disabilities." *See* Office of Human Resource Management, University of Ala. at Birmingham, *Policy 126: Hiring Individuals with Disabilities* (Issued Oct. 1980, rev. Mar. 1999).

- The University has a detailed grievance procedure for non-faculty employees. Office of Human Resource Management, University of Ala. at Birmingham, *Policy 608: Grievance Procedure for Nonfaculty Employees* (Issued Nov. 1980, rev. Aug. 1997).

PROGRAMS TO ASSIST PERSONS WITH DISABILITIES IN OBTAINING EMPLOYMENT

- The Alabama Department of Vocational Rehabilitation Services (VRS) provides employment-related services to adolescents and adults with disabilities through

partnerships with local school systems, colleges and universities, junior colleges, vocational technical schools and community rehabilitation programs. *See* ALA. CODE §§ 21-9-1 to 13 (1997).

- A state office staffed by a full-time attorney provides toll-free information to the public on the rights of the disabled and assists disabled persons by making referrals, providing public education and training, and collecting and analyzing statistical data. *See* ALA. CODE § 21-9-14 (Supp. 1999).
- Alabama Department of Rehabilitation Services (DRS) provides disability management and employee placement services for persons with disabilities. *See* ALA. CODE §§ 21-9-1 to 13 (1997).
- The Department of Adult Blind and Deaf, a division of the Alabama Institute of the Deaf and Blind (AIDB), assists adults with vision and hearing impairment. *See* ALA. CODE § 21-1-15 (1997).
- Home Industries for the Blind, a division of AIDB, creates employment opportunity for persons with sight impairment. *See* ALA. CODE §§ 21-2-1 to 4 (1997).

PUBLIC ACCOMMODATIONS FOR PERSONS WITH DISABILITIES

- All public buildings and facilities must be accessible to persons with disabilities. Act of Aug. 9, 1965, No. 224, 1965 Ala. Acts 315, codified as amended at ALA. CODE § 21-4-1 (1997).
- Disabled persons have equal rights to use streets, sidewalks, public buildings and public facilities. ALA. CODE § 21-7-2 (1997).
- Persons with disabilities are "entitled to full and equal accommodations, advantages, facilities and privileges"

with regard to public transportation, lodging, public accommodation, amusement, resorts, "and other places to which the general public is invited." ALA. CODE § 21-7-3 (1997).

- Disabled persons have access to housing accommodations. ALA. CODE § 21-7-9 (1997).
- It is a criminal offense to interfere with the statutory rights of disabled persons. ALA. CODE § 21-7-5 (1997).
- Alabama has a rehabilitation program for disabled persons who are homebound, providing medical care, adjustment training, attendant care, prosthetic appliances, home health care, home modifications, transportation and medical supplies. *See* ALA. CODE §§ 21-6-1 to 5 (1997).

EDUCATIONAL OPPORTUNITIES FOR PERSONS WITH DISABILITIES

- DRS offers an early intervention system for infants and toddlers with disabilities. *See* ALA. CODE §§ 21-3A-1, 21-9-2(3)(b) (1997).
- DRS provides services for children with special health-care needs from birth to age 21 and their families. *See* ALA. CODE §§ 21-3-1, 21-9-2(3)(a) (1997).
- DRS provides assistance to teachers, local school systems, and school nurses in the education of children with special health-care needs. *See* ALA. CODE §§ 21-3-1, 21-9-2(3)(a) (1997).
- DRS provides rehabilitation and education services to adolescents and adults with disabilities through partnerships with local school systems, colleges and universities, junior colleges, vocational technical schools and community rehabilitation programs. *See* ALA. CODE §§ 21-9-1 to 13 (1997).

- DRS provides assistance to children and adults with hemophilia. *See* ALA. CODE §§ 21-3-1, 21-9-2(3)(a) (1997).

- DRS offers State of Alabama Independent Living (SAIL) Service to persons with severe spinal cord or head injuries. *See* ALA. CODE §§ 21-6-1 to 5 (1997).

- "Today, Alabama Institute for Deaf and Blind (AIDB) is the nation's most comprehensive education and service program for individuals who are sensory impaired, serving more than 3,000 people and their families each year." Lynne Hanner, *AIDB Celebrates 140 Years . . . and a Passion for Service*, Sights & Sounds: The Magazine of Alabama Institute for Deaf and Blind, November 1998, at 4. One *Wall Street Journal* article described the AIDB's work as "a striking example of how disabilities can be overcome." Tony Horwitz, *Talladega, Ala., Is a User-Friendly City for Disabled People*, Wall St. J., Feb. 14, 1994, at A1.

- The Alabama School for the Deaf, a part of the Alabama Institute for the Deaf and Blind (AIDB), provides educational opportunities for persons with hearing impairment. Robert Hill Couch & Jack Hawkins, Jr., *Out of Silence and Darkness: The History of the Alabama Institute for Deaf and Blind 1858-1983* 21-32 (1983); *see* Act of Jan. 27, 1860, No. 253, 1859-60 Ala. Acts 344; ALA. CODE § 21-1-1 (1997).

- The Alabama Academy for the Blind, a part of AIDB, provides educational opportunities for blind persons. *See* Act of Feb. 18, 1867, No. 490, 1866-67 Ala. Acts 550; ALA. CODE § 21-1-1 (1997).

- The Helen Keller School of Alabama, a division of AIDB, provides education for children with both sight and hearing impairments. *See* Couch & Hawkins, *supra*, at 178-79.

DEINSTITUTIONALIZATION OF PERSONS WITH MENTAL ILLNESS

- Since 1975, commitment requires a judicial determination that "commitment or recommitment is the least restrictive alternative necessary and available for treatment of the person's illness." *See* Act of Oct. 10, 1975, No. 1228, § 8, 1975 Ala. Acts 2576 (codified at ALA. CODE § 22-52-37(7)(e) (1997)).

- In hearings on petitions for involuntary commitment, "[t]he least restrictive alternative necessary and available for the treatment of the respondent's mental illness shall be ordered." ALA. CODE § 22-52-10.1(a) (1997).

- When petitioned to order protective placement or other protective services, the court "shall give preference in making a determination to the least drastic alternative considered to be proper under the circumstances, including a preference for noninstitutional care whenever possible." Act of May 23, 1977, No. 780, § 4, 1977 Ala. Acts 1340 (codified at ALA. CODE § 38-9-6(c) (1992)).

Appendix C

Examples of Federal Disability Laws Applicable to State Recipients of Federal Funding

Section 504 of the Rehabilitation Act (29 U.S.C. § 794)

- Prohibits discrimination on the basis of disability with respect to employment and access to government services, programs and activities.
- Applies to State recipients of Federal funding.

Individuals with Disabilities Education Act (20 U.S.C. § 1400 et seq.)

- Aims to assure that all children with disabilities have available to them a free appropriate public education which emphasizes special education and related services.
- Requires States receiving assistance under the Act to provide numerous procedural safeguards for children and their parents or guardians.

Developmentally Disabled Assistance and Bill of Rights Act (42 U.S.C. § 6001 et seq.)

- Creates a Bill of Rights for persons with developmental disabilities, covering such matters as excessive use of chemical and physical constraints, visitation of parents, and provision of adequate medical care and nutrition.
- Provides Federal financial assistance to States through basic support formula grants to establish systems for the protection of developmentally disabled persons and their

rights. A State accepting funding must abide by the Act's requirements.

Architectural Barriers Act of 1968 (42 U.S.C. § 4151 et seq.)

- Sets forth standards of accessibility for the design and construction of newly constructed and altered buildings.
- Applies to the design and construction of any State building or project financed in whole or in part by a Federal grant or loan.

Appendix D

Americans With Disabilities Act
Title I

42 U.S.C. § 12101. Findings and purpose

(a) Findings

The Congress finds that—

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and

criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12102. Definitions

As used in this chapter:

(1) Auxiliary aids and services

The term "auxiliary aids and services" includes—

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) Disability

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) State

The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

42 U.S.C. § 12111. Definitions

As used in this subchapter:

(1) Commission

The term "Commission" means the Equal Employment Opportunity Commission established by section 2000e-4 of this title.

(2) Covered entity

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat

The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee

The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer

(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions

The term "employer" does not include—

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of Title 26.

(6) Illegal use of drugs

(A) In general

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C. § 801 et seq.]. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) Drugs

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C. § 812].

(7) Person, etc.

The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 2000e of this title.

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include—

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or

interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship

(A) In general

The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

42 U.S.C. § 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes—

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration—

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

> **(B)** denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered entities in foreign countries

(1) In general

It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of corporation

(A) Presumption

If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception

This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination

For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on—

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control, of the employer and the corporation.

(d) Medical examinations and inquiries

(1) In general

The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) Preemployment

(A) Prohibited examination or inquiry

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if—

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that—

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) Examination and inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

42 U.S.C. § 12113. Defenses

(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

(c) Religious entities

(1) In general

This subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(2) Religious tenets requirement

Under this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.

(d) List of infectious and communicable diseases

(1) In general

The Secretary of Health and Human Services, not later than 6 months after July 26, 1990, shall—

(A) review all infectious and communicable diseases which may be transmitted through handling the food supply;

(B) publish a list of infectious and communicable diseases which are transmitted through handling the food supply;

(C) publish the methods by which such diseases are transmitted; and

(D) widely disseminate such information regarding the list of diseases and their modes of transmissability to the general public.

Such list shall be updated annually.

(2) Applications

In any case in which an individual has an infectious or communicable disease that is transmitted to others through the handling of food, that is included on the list developed by the Secretary of Health and Human Services under paragraph (1), and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.

(3) Construction

Nothing in this chapter shall be construed to preempt, modify, or amend any State, county, or local law, ordinance, or regulation applicable to food handling which is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, which cannot be eliminated by reasonable accommodation, pursuant to the list of infectious or communicable diseases and the modes of transmissability published by the Secretary of Health and Human Services.

42 U.S.C. § 12114. Illegal use of drugs and alcohol

(a) Qualified individual with a disability

For purposes of this subchapter, the term "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of construction

Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who—

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

(c) Authority of covered entity

A covered entity—

(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

(4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; and

(5) may, with respect to Federal regulations regarding alcohol and the illegal use of drugs, require that—

(A) employees comply with the standards established in such regulations of the Department of Defense, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Defense);

(B) employees comply with the standards established in such regulations of the Nuclear Regulatory Commission, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Nuclear Regulatory Commission); and

(C) employees comply with the standards established in such regulations of the Department of Transportation, if the employees of the covered entity are employed in a transportation industry subject to such regulations,

including complying with such regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Transportation).

(d) Drug testing

(1) In general

For purposes of this subchapter, a test to determine the illegal use of drugs shall not be considered a medical examination.

(2) Construction

Nothing in this subchapter shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

(e) Transportation employees

Nothing in this subchapter shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to—

(1) test employees of such entities in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and

(2) remove such persons who test positive for illegal use of drugs and on-duty impairment by alcohol pursuant to paragraph (1) from safety-sensitive duties in implementing subsection (c) of this section.

42 U.S.C. § 12115. Posting notices

Every employer, employment agency, labor organization, or joint labor-management committee covered under this subchapter shall post notices in an accessible format to applicants, employees, and members describing the applicable provisions of this chapter, in the manner prescribed by section 2000e-10 of this title.

42 U.S.C. § 12116. Regulations

Not later than 1 year after July 26, 1990, the Commission shall issue regulations in an accessible format to carry out this subchapter in accordance with subchapter II of chapter 5 of Title 5.

42 U.S.C. § 12117. Enforcement

(a) Powers, remedies, and procedures

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

(b) Coordination

The agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the Rehabilitation Act of 1973 [29 U.S.C. § 701 et seq.] shall develop procedures to ensure that administrative complaints filed under this subchapter and under the Rehabilitation Act of 1973 are dealt with in a manner that

avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this subchapter and the Rehabilitation Act of 1973. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations, and the Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed. Reg. 7435, January 23, 1981)) in regulations implementing this subchapter and Rehabilitation Act of 1973 not later than 18 months after July 26, 1990.

* * *

Americans With Disabilities Act
Title II

Part A

42 U.S.C. § 12131. Definitions

As used in this subchapter:

(1) Public entity

The term "public entity" means—

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 502(8) of Title 45).

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the

services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

42 U.S.C. § 12134. Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

(b) Relationship to other regulations

Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of Title 29. With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under such section 794 of Title 29.

(c) Standards

Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this subchapter. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

* * *

42 U.S.C. § 12202. State immunity

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in[1] Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

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[1] So in original. Probably should be "in a."

Code of Federal Regulations

Title 28—Judicial Administration

Chapter I—Department of Justice

Part 35—Nondiscrimination on the basis of disability in state and local government services

Subpart B—General Requirements

§ 35.130 General prohibitions against discrimination.

(a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

(b)(1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability—

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with

disabilities with aids, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program;

(vi) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards;

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:

(i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities; or

(iii) That perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State.

(4) A public entity may not, in determining the site or location of a facility, make selections—

(i) That have the effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination; or

(ii) That have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the service, program, or activity with respect to individuals with disabilities.

(5) A public entity, in the selection of procurement contractors, may not use criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

(6) A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. The programs or activities of entities that are licensed or certified by a public entity are not, themselves, covered by this part.

(7) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

(8) A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless

such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

(c) Nothing in this part prohibits a public entity from providing benefits, services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities beyond those required by this part.

(d) A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

(e)(1) Nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit provided under the ADA or this part which such individual chooses not to accept.

(2) Nothing in the Act or this part authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual.

(f) A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

(g) A public entity shall not exclude or otherwise deny equal services, programs, or activities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

(7)

No. 99-1240

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AUG 11 2000

IN THE
Supreme Court of the United States

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA AND THE ALABAMA DEPARTMENT OF YOUTH SERVICES,
Petitioners,

v.

PATRICIA GARRETT AND MILTON ASH,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS PATRICIA GARRETT AND MILTON ASH

COUNTER STATEMENT OF FACTS

The Complaints in these consolidated cases, alleging violations of the employment provisions of the Americans with Disabilities Act (ADA), were dismissed by the District Court on Eleventh Amendment grounds, thus pretermitting adjudication of the merits. We therefore outline the facts as stated in the Complaints and in affidavit and deposition testimony submitted by the plaintiffs (respondents here) prior to the dismissal.

1. **Patricia Garrett.** Respondent Patricia Garrett was hired by Petitioner University of Alabama-Birmingham ("UAB") as a registered nurse in the University Hospital, in 1977 (GC3, GA2, GD15).[1] While employed, she attained a Masters degree in Nursing, and then received several promotions, culminating in her appointment, in 1992, as Director of Nursing, Women's Services/Neonatology (GC3, GA 2-3)

In late August 1994, Garrett was diagnosed with breast cancer, and had a lumpectomy, node removal and biopsy (GD48). Her treatment plan, established at that time, was radiation treatments commencing in October 1994, and chemotherapy starting in January 1995. (GA5, GD49-50). During these treatments, Garrett's supervisor, Sabrina Shannon, Associate Executive Director of the Hospital, initially encouraged, and then pressured, Garrett to take leave or to transfer to a lesser job. (Garrett GC4-5; 10, 14-15;

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[1] As used herein, "GC_" means p._ of Garrett's amended complaint (Garrett R1-20); "GA_" means ¶ _ of Garrett's affidavit (Garrett R1-47), and AD" means p. _of Garrett's deposition testimony (Garrett R1-48)..

GD154-55, 159-60, 199-201, 205). A fellow employee told Garrett that Shannon didn't like "sick people" and had a history of getting rid of them. (GA11).

Garrett made clear to her supervisor that she wished to continue to carry the full duties of her job. Garrett, in fact, satisfactorily performed those duties. She did so during the period of her preventative treatments, when on some occasions fatigue necessitated that she complete her duties by working at home in the evenings. (GA 9, 14-15, GD 70). Nevertheless, Garrett's supervisor made continuing threats to transfer Garrett to a lesser job (GD 199-204, 210) In addition, Garrett's supervisor listed Garrett's job as "being recruited" (when Garrett protested, the supervisor told her the listing was a "typographical error"); at another time, Garrett found herself locked out of the Hospital's computer system; and, finally, Garrett's supervisor solicited one of Garrett's subordinates to assume Garrett's duties while Garrett would be transferred to a temporary position to a satellite hospital. (GA13-15, GD 275-279).

In March 1995, Garrett described the foregoing events to her physician, who advised that the addition of the workplace harassment to her chemotherapy treatment was inimical to her health. Upon his recommendation, Garrett took leave for the duration of her chemotherapy—leave to which she was entitled under the Hospital's employee handbook. (GA15-16; GD204-205, 249).

When Garrett was ready to return to work in July 1995, Shannon announced that UAB did not want Garrett back. However, at the urging of the Hospital's Personnel Department, Garrett was allowed to return to the job, and fully and satisfactorily performed her duties. (GD 266-270, 290, 371). Nonetheless, just two weeks after Garrett's return, Shannon declared that there was no way Garrett could be successful in her job, and that Garrett's options were to quit, to accept a demotion to the nursing pool, or to be discharged.

(GC5, GA17, GD 354, 358). Garrett's request that at the least she be retained in her position until October 1995, for insurance purposes, was refused. (GD 356-57). In these circumstances, Garrett fortunately found a position as a Nurse Manager at a convalescence home, albeit at a $13,000 decrease in salary (GA19).

Garrett then filed her lawsuit against UAB, alleging *inter alia* that UAB's actions violated her rights under the ADA in the following respects: (1) defendant, by forcing her from the Director of Nursing position, "intentionally [and] maliciously . . . discriminated against [her] . . . because of her disability," (2) defendant failed to accommodate her, by not proffering another position of comparable salary and status; and (3) defendant retaliated against her for requesting such accommodation. (GC6-7).

2. **Milton Ash.** Respondent Milton Ash began working as a Security Officer for Petitioner Alabama Department of Youth Services [ADYS] in September 1993 (AC3).[2] Ash performed his job well, and, in 1996, was promoted to the classification of Youth Services Security Officer. (AA 10, 26). Throughout his tenure with ADYS, Ash has suffered from severe chronic asthma and other respiratory disabilities; he is vulnerable to asthma attacks so severe that they require hospitalization (AC2, AA2-5).

Between 1993 and 1996, Ash repeatedly made requests for two accommodations, to eliminate conditions that were exacerbating his respiratory condition. The first was that Respondent ADYS enforce its promulgated "no-smoking" rule in the Gatehouse, where he was confined in a small workspace with fellow employees who smoked in violation of the rule. (AA14-15). The second was for the repair of ADYS vehicles Ash was required to drive, so that they did not emit

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[2] As used herein, "AC_" means p._ of Ash's complaint (Ash R1-1) and AA_5" means ¶– of Ash's affidavit (Ash R1-14, Exh. 1).

carbon monoxide fumes into the passenger compartment. (AC3; AA11-12).

ADYS took no steps to accommodate either of these requests, despite Ash's presentation of notes from his doctor explaining that both conditions were having an adverse effect on his health. (AA 11-17, 21, 30-31, 33-34). Instead, the Superintendent of Youth Services suggested to Ash that he "just go ahead and quit, . . . just go home and draw disability." (AA20).

In July 1996, Ash was diagnosed with yet another respiratory disease, sleep apnea. His doctor urged that ADYS accommodate Ash, who was then assigned to rotating shifts, by transferring him to the daylight shift so that he could sleep normal hours. (AA24). ADYS agreed that it would do so when a vacancy occurred on the daylight shift.

Thereafter, Ash filed an EEOC charge alleging that ADYS had violated the ADA by, *inter alia*, failing to enforce its no-smoking rule and failing to fix the carbon monoxide leaks in its vehicles. (AC4, AA23) After this charge was filed, two openings occurred on the daylight shift. Instead of transferring Ash to that shift, as had been promised, ADYS transferred two security officers junior to Ash, who had not claimed a medical need to transfer. (AC4, AA25). In September 1996, Ash received his periodic performance evaluation, which was "meets standards" rather than, as in his previous evaluation, "exceeds standards." (AC4, AA26).[3]

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[3] As Ash's evaluations reflect, and as his complaint alleged (AC5), at all times he was able to perform his job satisfactorily. Petitioners intimate that Ash acknowledged otherwise, citing the allegation in his complaint that working was one of the major life activities in which he was "substantially impaired" by reason of his disabilities. Pet. 29. This misunderstands Ash's complaint, as Petitioners misunderstand a similar allegation in Garrett's complaint. In order to qualify as a person with disabilities under the ADA, one must be suffering a substantial impairment of a major life activity by reason of the disability. The purpose of this requirement is to limit ADA coverage only to persons with serious disabilities. To

Ash then filed his lawsuit, alleging, *inter alia*, that ADYS had violated the ADA by denying him the reasonable accommodations of enforcing its no-smoking rule, repairing the carbon monoxide leaks in the vehicles, and transferring him to the first shift; and that ADYS further violated the ADA by retaliating against him (by refusing the transfer and lowering his evaluation) for asserting his ADA rights via his initial EEOC charge. (AC18-22). The Complaint alleged that ADYS' actions were done "intentionally, and with malice" (AC5).

3. **The Provisions of the ADA Relevant to this Case.** The Complaints in these consolidated cases allege that the complained-of actions violated both Title I and Title II of the ADA. Title I deals exclusively with employment, and covers private, state, and local governmental employers with 15 or more employees. § 12111(5).[4] Title II forbids discrimination by public entitities with respect to any of their programs, services or activities, and thus applies to many

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be substantially impaired in the major life activity of working, one's disability must preclude performing a range of jobs. 29 C.F.R. 1630.2 (j)(3). The ability or inability to do one particular job is irrelevant to this qualification standard [*id*]. The allegations in Ash's and Garrett's Complaints meant that there was a range of jobs they could not do (thus showing that their disabilities were serious), not that they could not do the particular job on which they were employed.

[4] The federal government and bona fide membership clubs are excluded from the definition of "employer." *Id.* At the time the ADA was enacted, the federal government was already governed by more sweeping provisions. Section 501(b) of the Rehabilitation Act of 1973, 29 USC '791(b), and implementing regulations, 29 CFR § 1613.701-709, imposed on the federal government an affirmative action obligation, as well the substantive non-discrimination obligations imposed by Section 504 on state and local governmental employers who took federal funds. In 1992, shortly after the ADA was enacted, Congress amended Section 501 of the Rehabilitation Act to declare expressly that the non-discrimination obligations of the federal government included compliance with all the employment provisions of the ADA, in addition to the affirmative action obligation already stated in Section 501(b). *See*, 29 USC § 791(g).

diverse areas in addition to employment. *See, e.g., Olmstead v L.C.*, 527 US 581 (1999) (institutionalization); *Pennsylvania Dep't of Corrections v Yeskey*, 524 US 206 (1998) (prison programs). In the case of employment, the Attorney General—who is charged in § 12134 with responsibility for promulgating regulations to implement Title II—has issued a regulation declaring that, insofar as the titles overlap (i.e, in their coverage of employment discrimination by public employers of 15 or more employees), Title II's substantive provisions are to be interpreted *in haec verba* with Title I's substantive provisions. 28 CFR 35.140.[5] See also, Section-by-Section Analysis, 28 CFR Part 35, App. A, 35.140.[6]

The Title I substantive scheme, in a nutshell, is this: Protection is accorded only to "qualified individual[s] with a disability." 42 USC § 12112. In this regard, "disability" is defined in the ADA as "a physical or mental impairment that substantially limits one or more of the major life activities of the individual," § 12102(2), and a "qualified individual with a disability" is one "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." §12111(7).

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[5] This regulation rests on the Attorney General's understanding that Title II applies to the employment practices of public employers. That is, as well, the understanding of the Eleventh Circuit, which decided this case. *Bledsoe v Palm Beach County Soil & Water Conservation District*, 133 F3d 816, 820-25 (11th Cir. 1998). *But see, contra, Zimmerman v Oregon Department of Justice*, 170 F3d 1169 (9th Cir. 1999), *cert petition pending* (No.99-243).

[6] While the States' substantive obligations respecting employment are the same under Title II as under Title I, the availability of both titles is relevant to remedies and procedures, for Title I is enforced pursuant to the remedial scheme of Title VII of the Civil Rights Act of 1964, *see* 42 USC 12117(a), while Title II is enforced pursuant to the remedial scheme of Title VI of the Civil Rights Act of 1964. *See*, 42 USC 12133; *Olmstead*, 527 US at 590, n.4.

Title I states a "general rule" banning employment discrimination against a qualified individual "because of the disability of such individual." § 12112(a). The statute then defines certain specific actions as constituting "discrimination." These provisions are described infra at 38-46.

Both titles authorize an aggrieved individual to sue his or her employer (§ 12117, 12133). The Act expressly declares Congress' intention to lift the States' Eleventh Amendment immunity. § 12202. The Act also contains a typical severability clause, 42 USC § 12213, declaring that the unconstitutionality of one provision "shall not affect the enforceability of the remaining provisions of the Act."

SUMMARY OF ARGUMENT

The question, properly stated, is whether Congress had power under § 5 to enact the ADA employment provisions. We focus only on the ADA's employment provisions, because it is only those that are invoked by the plaintiffs in these cases, and, given the ADA's severability clause as well as traditional "case and controversy" considerations, it is only those whose constitutionality is properly at issue.

This Court's decisions defining Congress' § 5 power establish that, at the least, Congress has § 5 power to address identified conduct transgressing the Fourteenth Amendment's substantive provisions through a legislative scheme tailored to remedying or preventing such conduct, in the sense that the scheme is congruent and proportional to the constitutional injury to be prevented or remedied. *City of Boerne v Flores*, 521 US 507 (1997); *Kimel v Florida Bd. of Regents*, 120 S.Ct. 631 (2000).

In Part I, we address the "identified conduct" prong of the *Boerne/Kimel* two-part test. We show that Congress *found* that employment disability discrimination by State and other public employers was, at the time of passage of the ADA, a serious and pervasive problem, rooted in deeply and widely-held prejudices regarding persons with disabilities. And we

describe the comprehensive record amassed over years of diligent congressional inquiry that supports that finding. For the sake of exposition, our presentation divides the evidence upon which Congress relied into three categories.

(a) First is the direct evidence of unconsitutional employment discrimination by State and local governmental employers. Congress received voluminous evidence—including governmentally-authorized studies, reports of individual acts, and the assessment of State officials themselves—that public employer workplace discrimination against persons with disabilities motivated by prejudice continued to be a pervasive reality. We detail this evidence at pp. 20-25, *infra*.

(b) Second is the evidence that located the roots of that disability prejudice in feelings of discomfort and aversion, stigmatization, false stereotyping, and paternalism. As we show, decisionmaking in the public workplace respecting persons with disabilities that is animated by these sorts of feelings violates the Equal Protection Clause. *See*, 26-31, *infra*.

(c) Third is the voluminous evidence gathered by Congress of invidious disability discrimination by State and local government in areas apart from employment. Given the nature of the factors that cause disability discrimination, Congress reasonably drew the logical conclusion that state actors who make employment decisions are not different in kind from those governmental actors whose prejudices are so widely manifested in institutions, education, voting, and public services, and thus that the pervasive prejudice could not be expected to stop just short of the door to the workplace. *See*, pp. 31-35, *infra*.

We then show that, as Congress expressly found, existing State law was inadequate to solve the disability discrimination problem. The evidence before Congress of pervasive continuing discrimination made this clear, and it

was confirmed by reports from State officials. *See*, pp. 35-38, *infra*.

In Part II, we demonstrate that the ADA's employment provisions are a congruent and proportional response to the pervasive problem Congress found. Congress' § 5 power includes the enactment of "prophylactic legislation" to meet "a difficult and intractable problem" of a "pattern" of discrimination by the States "at the level of constitutional violation." *Kimel*, 120 S. Ct. at 648-49. The Senate and House Committee Reports on the ADA explain, as to each of the ADA substantive employment provisions, why Congress deemed the provision a necessary prophylactic against workplace disability discrimination based on "pervasive bias." These well-considered judgments—targeted at practices that experience indicated were likely to manifest disability prejudice and to serve as a means to effectuate disability discrimination—were well within Congress' broad § 5 legislative power. And Congress acted with due proportion by crafting each provision to leave untouched employment practices likely to be legitimately motivated. We conclude by showing why it was proper for Congress to apply the ADA nationwide, and not to include an automatic "sunset" provision. *See*, pp. 38-50, *infra*.

ARGUMENT

There are occasions in the public life of the Nation when the evidence of pervasive public and private oppression of a group of citizens is so plain and so compelling that a consensus emerges for a national response in the form of a comprehensive federal legislative remedy—a consensus that knows no partisan political conflict, no ideological disagreement, and no Federal/State divide. The enactment of the Americans with Disabilities Act in 1990 was such an occasion.

The ADA grew out of more than 20 years of hearings and investigations into the deplorable public- and private-sector treatment of persons with disabilities, and their consequent deplorable situation.[7] Those hearings and investigations led to the introduction of a broadly-sponsored legislative response; to two years of fine-tuning in committee and floor deliberations leading to a final bill that was the product of "compromise, carefully crafted and painstakingly wrought;"[8] and to passage of the final bill by 91-6 in the Senate and 377-28 in the House.[9]

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[7] With respect to the ADA alone, Congress held 18 hearings, 63 field hearings, considered innumerable studies and reports evaluating the discriminatory treatment of persons with disabilities and the reasons therefor, issued five committee reports, and engaged in prolonged floor debate. See, Timothy Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temple L. Rev. 393, 393, 414 (1991). The ADA deliberations, moreover, rested on the institutional knowledge and expertise Congress had gained in considering and enacting prior statutes addressing discrimination on the basis of disability. Lowell P. Weicker, Jr., *Historical Background of the Americans with Disabilities Act*, 64 Temple L.Rev. 387, 387-89 (1991). A fuller description of this deliberative process appears in Brief Amicus Curiae of the National Council on Disability in Support of Respondents.

[8] 135 Cong. Rec. S10710 (daily ed. Sept. 7, 1989) (Sen. Harkin), hereinafter "___ C.R. ___." See also, to the same effect, *id at* S10714 (Sen. Hatch).

[9] 135 C.R. S9695; *id.* at H4629.

As the legislation moved forward, it was championed by Federal and State authorities alike. Attorney General Thornburgh for the Bush Administration supported its passage,[10] as did the leaders of both parties in Congress,[11] the National Association of Attorneys General, the National Association of Counties, and the National Association of State Mental Retardation Program Directors.[12] The ADA marshalled this unity of action for the most compelling of reasons; as President Bush stated in signing the ADA into law:

> [T]ragically, for too many Americans, the blessings of liberty have been limited or even denied.
>
> The Civil Rights Act of '64 took a bold step towards righting that wrong. But the stark fact remained that people with disabilities were still victims of segregation and discrimination, and this was intolerable. Today's legislation brings us closer to that day when no Americans will ever again be deprived of their basic guarantee of life, liberty, and the pursuit of happiness.[13]

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[10] 3 LH 2014-15. Throughout this brief, "LH" refers to the three-volume Legislative History of Public Law 101-336 (the ADA) published by the Committee on Education and Labor, U.S. House of Representatives, 101st Cong. 2d Sess. (1990), Serial Nos. 102-A, B and C.

[11] 135 C.R. S10714 (Sen. Hatch); 134 C.R. S5106 (Sen. Weicker); 135 C.R. S10789 (Sen. Kennedy); 135 C.R. S10790-91 (Sen. Dole); 135 C.R. S10711-12 (Sen. Harkin).

[12] 135 C.R. S10710. In addition, the fifty Governors' Committees advised Congress that State laws were inadequate. See p. 35, infra. There was no opposition to the bill from the States.

[13] The White House, Office of the Press Secretary, *Remarks by the President during Ceremony for the Signing of the Americans with Disabilities Act of 1990*, published in National Foundation for the Study of Employment Policy, *Legislative History of the Americans with Disabilities Act* at 844, 845 (1990).

In its essence, what Congress found regarding employment in its lengthy investigation was a pattern and practice of invidious discrimination against people with disabilities, in both the public and private sector—discrimination that resulted from deep-rooted and widely-held feelings of irrational prejudice against, fear of, and ignorance about persons with disabilities. And, in its essence, what Congress did was to enact both a general prohibition on employment discrimination based on disability and an interlocking set of discrete anti-discrimination norms addressed to employment practices that experience had shown are particularly likely to manifest disability prejudice and to serve as a means of effectuating disability discrimination. In so doing, Congress covered State employers as well as local governmental and private employers, and provided aggrieved employees a cause of action to vindicate their rights.

At the time the ADA was enacted, the governing law—stated in *Pennsylvania v Union Gas Co.*, 491 US 1 (1989)—was that Congress, when exercising its Article I legislative powers, may authorize private party suits against States to enforce the federal law. But this Court has since overruled *Union Gas*, holding, in *Seminole Tribe v Florida*, 517 US 44 (1996), that Congress is precluded by the Eleventh Amendment from authorizing private party suits against States, except when exercising its power, conferred in § 5 of the Fourteenth Amendment, to "enforce by appropriate legislation" that Amendment's substantive provisions.[14] The question whether Congress had § 5 power to enact the ADA thus obtains.

The § 5 question here is focused—and made salient—by the set of recent decisions of this Court from *City of Boerne* to *Kimel*. Those decisions establish that, at the least,

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[14] Four members of this Court have stated that they do not accept the holding in *Seminole Tribe*. *See, e.g., Kimel*, 120 S.Ct. at 650-54 (Stevens, J., dissenting).

Congress has § 5 power to meet identified conduct transgressing the Fourteenth Amendment's substantive provisions through a legislative scheme tailored to remedying or preventing such conduct, in the sense that the scheme is congruent and proportional to the constitutional injury to be prevented or remedied. *Kimel*, 120 S. Ct. at 644-49.

The "identified conduct" prong of this two-part test is, we believe, straightforward in concept. The "congruent/proportional" prong is more complex, and we would note two points of elaboration. First, congruence and proportion are relational terms—the nature and dimension of the wrong determine the nature and dimension of a congruent and proportional legislative response. "Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *Kimel*, 120 S.Ct. at 648 (*quoting City of Boerne v. Flores*, 521 US at 530-31.

Second, subject to the limit, recognized in *City of Boerne*, 521 US at 519, that § 5 grants "the power 'to enforce' not the power to determine *what constitutes* a constitutional violation," § 5 is a "broad" grant of legislative power. *Kimel*, 120 S.Ct. at 644. "[T]he Framers indicated that Congress was to be chiefly responsible for implementing the rights created in [the Civil War Amendments.]" *South Carolina v Katzenbach*, 383 US 301, 325-26 (1966) (*quoting Ex parte Virginia*, 100 US 339, 345 (1879)). And, precisely because § 5 is a grant of the most protean of constitutional powers, it "[brings] within the domain of congressional power," the enactment of "[w]hatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the . . . equal protection of the laws against State denial or invasion, if not prohibited. . . ." *City of Boerne*, 521 US at 517-18 (*quoting Ex parte Virginia*, 100 US at 345-46).

Given the nature of that grant, "[i]t is for Congress in the first instance to 'determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' " *City of Boerne*, 521 US at 536 (*quoting Katzenbach v Morgan*, 384 US 641, 651 (1966)). As the Court explained in *Katzenbach*, 384 US at 653:

> It [is] for Congress, as the branch that [makes] this judgment, to assess and weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction . . . as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the [state action] . . .

The sum of the matter is that "[a]s against the reserved powers of the States, Congress may use any rational means" to effectuate the constitutional prohibitions. *South Carolina v Katzenbach*, 383 US at 324. It follows, we submit, that the ultimate *Boerne/Kimel* question in this case is whether the ADA employment provisions are a rational legislative means of remedying and preventing the constitutional problem Congress found. Our single focus is on the employment provisions of the ADA because the ADA's severability provision and the wise constraints of the Article III "case and controversy" requirement make it plain that it is only those provisions' constitutionality that is at issue here.[15]

In Part I of this brief we show that Congress found, and rightly so, that employment discrimination by State and other

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[15] So that we are not misunderstood, we wish to note that we have no doubt that the ADA in its entirety is a proper exercise of Congress' § 5 powers. But given the nature of the *Boerne/Kimel* inquiry and the size of the evidentiary record of public disability discrimination assembled by the ADA Congress, it would take far more than the fifty pages this Court's rules allot to make a full, and fully reasoned, showing that addresses each of the areas covered by Title II of the ADA. .

public employers against persons with disabilities, of the kind that violates the Equal Protection Clause, was, at the time of passage of the ADA, a serious and pervasive problem.[16] In Part II we show that the ADA's substantive commands respecting employment are a congruent and proportional response to that problem.

I. CONGRESS PROPERLY FOUND A SERIOUS AND PERVASIVE PROBLEM OF UNCONSTITUTIONAL EMPLOYMENT DISCRIMINATION

A. What Conduct Offends the Equal Protection Clause?

In asking whether Congress had reason to believe that there was widespread unconstitutional discrimination against persons with disabilities in public employment, it is necessary to begin by defining what public conduct violates the Equal Protection Clause. The exact perimeters of that Clause's application to disability discrimination are not altogether clear from the decisional law. But this Court's decisions do most assuredly establish that *at a minimum* the Equal Protection Clause forbids three categories of public conduct: (1) conduct that disfavors persons with disabilities that is motivated by "mere negative attitudes" against such persons, or by "vague, undifferentiated fears," *Cleburne v. Cleburne Living Ctr.*, 473 US 432, 448-49 (1985); *see also*, *Romer v Evans*, 517 US 620, 635 (1996); (2) conduct that disfavors

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[16] We use the term "State and other public employers" rather than just State employers, because while local governments do not enjoy Eleventh Amendment immunity, *Mt. Healthy City School District v Doyle*, 429 US 274, 280 (1977), their discrimination is "state action" violative of the Fourteenth Amendment and thus a proper occasion for Congress' exercise of its Section 5 power. As will be apparent from the text, much of the evidence relates to employment discrimination by the States themselves.

such persons that is irrational and/or arbitrary;[17] and (3) conduct that treats such persons and similarly situated groups unequally, *Cleburne*, 473 US at 439-40; *Olmstead v. L.C.*, 527 US 581, 613 (1999) (Kennedy, J., concurring).[18]

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[17] *Bankers Life & Cas. Co. v Crenshaw*, 486 US 71, 83 (1988) ("arbitrary and irrational discrimination violates the Equal Protection Clause even under our most deferential standard of review"); *Lindsey v Normet*, 405 US 56, 79 (1972) (same); *Romer v Evans*, 517 US 620, 630 (1996) (constitutionality hinged on whether classification was arbitrary). Even conduct that disqualifies but a single individual is unconstitutional if arbitrary. *Village of Willowbrook v Olech*,120 S.Ct. 1073 (2000).

[18] It may well be that the Equal Protection Clause affords more constitutional protection to persons with disabilities than we hazard in text. We note here some of the unsettled questions. (1) It is not altogether clear whether the particulars in this Court's opinions defining the application of the "rational basis" test are matters of constitutional command, or simply of judicial restraint. *See e.g., FCC v Beach Communications*, 508 US 307, 313 (1993) (rational basis standard is "a paradigm of *judicial* restraint" (emphasis added); *Cleburne*, 473 US at 439-40 (*absent congressional action*, court will apply rational basis standard) . And see, for a full exposition of this issue, Robert C. Post & Reva B. Siegel, *The Uncertain Future of Federal Antidiscrimination Law: Morrison, Kimel, and the Dismantling of Congressional Section 5 Powers*, at 19-23, 110 Yale L.J. (forthcoming Dec. 2000) (draft lodged with Clerk). (2) It is unsettled whether claims of disability discrimination are governed by rational basis scrutiny or by heightened scrutiny. *See, Schweiker v. Wilson*, 450 US 221, 231 n. 13 (1981) (declining to decide re mental illness); *Heller v Doe*, 509 US 312 (1993) (declining to decide whether *Cleburne* remains the standard for mental retardation, perhaps because of Congress' intervening factual findings in the ADA, see *id.* at 335&n1, 336-37 (Souter, J., dissenting)). (3) Even if rational basis scrutiny applies, it is unsettled whether, in the case of disability, the rationality of the state action turns on a balancing test, weighing the justification for the classification against the degree of injury it would inflict, as the controlling votes in *Cleburne* declared, 473 US at 452 and n.4 (Stevens, J., concurring); *cf. Romer v Evans*, 517 US at 635 ("Amendment 2. . . inflicts on [gays and lesbians] immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it"). (4) It is unsettled whether action that

B. Congress Found Pervasive Discrimination Against Persons with Disabilities in A Wide Variety of Contexts, Including State Employment.

Congress in its extensive "findings" in § 12101 of the ADA, found, *inter alia*, that isolation and segregation of persons with disabilities "continue to be a serious and pervasive problem" (§ 12101(2)), and that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis..." (§ 12101(9)). *See also*, S. Rep. 8, (noting "the severity and pervasiveness of discrimination"); *id.* at 8-9 (quoting approvingly a witness' testimony that "our society is still infected by the ancient, now almost subconscious assumption that people with disabilities are less

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disadvantages only members of a historically discriminated-against group, and no-one else, is shielded by the holdings in *Washington v Davis* 426 US 229 (1976) and *Massachussetts v Feeney*, 442 US 256 (1979) (where the Court relied upon the fact that others were also impacted adversely by the action), or whether such action is governed by the standard announced in *M.L.B. v. S.L.J.*, 519 US 102, 126-27 (1996). (5) It is unsettled whether the Equal Protection Clause requires States to provide persons with disabilities "equal access" to State services via, e.g., a ramp to a schoolhouse door. See, *Hendrick Hudson Dist. Bd. of Ed. v Rowley*, 458 US 176, 200 (1982); *Irving Independent School Dist. v. Tatro*, 468 U.S. 883, 891 (1984).

We do not brief these issues further, as we believe the ADA is a proper exercise of Congress § 5 power even on the assumption that the scope of the Equal Protection Clause is as described in text. Assuming, *arguendo*, that the propriety of exercising the § 5 power turned on the answers to these questions, it has been suggested that the Court should uphold congressional action as a proper exercise of § 5 power when it is grounded in plausible interpretations of the Fourteenth Amendment that do not conflict with holdings of this Court. Post & Siegel, supra, at 28-33.

than fully human"); *id* at 11 (citing the degrading experiences encountered by persons with disabilities).[19]

The findings recite that such disability discrimination persists in a number of "critical areas," the first listed of which is "employment" (§ 12101(3)).[20] This finding makes no distinction between public sector employment and private sector employment. Congress had before it voluminous evidence of employment discrimination against persons with disabilities in both sectors, and it is clear in context that Congress meant the finding to cover both. Others of the "critical areas" listed in that same sentence ("education, ... institutionalization, . . . voting, and access to public services") are largely public sectors, leaving no doubt that § 12101(3) refers to the public sector, as this Court found in *Yeskey*, 524 US at 211-12, and *Olmstead*, 527 US at 581.

"In reviewing the constitutionality of a statute, courts must accord substantial deference to the predictive judgments of Congress. . . . We owe Congress' findings deference in part because the institution is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions." *Turner Broadcasting Sys., Inc. v FCC*, 520 US 180, 195 (1997) (citations omitted). *See also, City of Boerne*, 521 US at 536. And, as we now show, Congress' finding that there was a pervasive problem of disability discrimination in public sector employment was a proper exercise of its unique institutional capacity "to amass

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[19] Throughout this brief, "S. Rep." Refers to Senate Comm. On Labor and Human Resources, S. Rep. 101-116, 101st Cong., 1st Sess. (1989). See also, to same effect, House Comm. on Education and Labor, HR Rep. No. 485 (II), 101st Cong., 2d Sess. at 28-32 (1990), reprinted in 1990 U.S.C.C.A.N. 303 (hereinafter "H.Rep. (pt. 2)"); House Comm. on the Judiciary, HR Rep. No. 485 (III), 101st Cong. 2d Sess, at 25 (1990) (hereinafter "H.Rep. (pt. 3)").

[20] The Committee Reports also reflect Congress' finding that employment discrimination based on fear, ignorance and prejudice is pervasive. See infra, 26.

the stuff of actual experience and cull conclusions from it." *United States v Gainey*, 380 US 63, 66-67 (1965). *See also*, *Turner Broadcasting*, 520 US at 200, 208-09.

For the sake of clarity of exposition, we divide the evidence on which Congress' finding rests into three categories. In Section (1), we describe the evidence before Congress of unconstitutional employment discrimination by States and by local governments. In Section (2), we discuss the evidence, credited by Congress, of the pathology of prejudice against persons with disabilities that explains the discrimination and shows why it is so prevalent and persistent. In Section (3), we provide a brief overview of the evidence before Congress of State discrimination against persons with disabilities in areas other than employment—evidence which supports Congress' recognition that disability prejudice is so deeply ingrained that, unless checked, it would continue to manifest itself in public sector employment as elsewhere.

As this showing will demonstrate, the status of the ADA on the "identified conduct" prong of the *Boerne/Kimel* inquiry is at the polar opposite to the status of the Age Discrimination in Employment Act addressed in *Kimel*. In the ADA, Congress made express findings that there was a pervasive problem of unconstitutional State and local government conduct, whereas Congress made no such finding in the ADEA. See *Kimel*, 120 S.Ct. at 649. And, the ADA Congress made those findings on a record that fully supports it, whereas the ADEA Congress proceeded on an empty record. *Id.*

1. Evidence of Unconstitutional Employment Discrimination

A congressionally-created agency, the Advisory Commission on Intergovernmental Relations [ACIR][21]—a majority of whose members were State and local governmental officials[22]—published, and distributed to each member of the ADA Congress,[23] a report addressing, *inter alia*, why so few persons with disabilities were employed by the States. ACIR, *Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal (A-111, April 1989)* (hereinafter, "ACIR Rep.").

The report described the results of a survey the Commission conducted of "officials in state agencies." 82.7% of the State officials polled declared that "negative attitudes" or "misconceptions by employers about the work capabilities of persons with disabilities" had either a "strong" or "moderate" impact on State employment of persons with disabilities, *id* at 72-73, 120.[24] In addition, ACIR invited state officials to provide narratives stating what they thought

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[21] ACIR was established by the 86th Congress (Public Law 86-380; 73 Stat. 703) as a "permanent, bipartisan body," "to give continuing study to the relationship among local, state, and national levels of government." Among its statutory functions was to "[m]ake available technical assistance to the executive and legislative branches of the Federal Government in the review of proposed legislation to determine its overall effect on the Federal system."

[22] The Commission had twenty members at the time this report was published: two Governors, three members of State legislatures, three mayors, three county officials, six members of Congress (three from each house), the US Attorney General, and two private citizens. ACIR Rep., at i.

[23] See Appendix to this brief (original lodged with Clerk). Even before the report was published, the draft of the ACIR Report was described in testimony to Congress, 2 LH 1614.

[24] 34.7% of state officials polled said 'strong,' 48.0% said 'moderate,' 10.7% said 'weak,' and 2.0% said 'none.' (*Id.* 72).

was impeding the States' employment of more persons with disabilities:

> State . . . public officials . . . reiterated the significant and often negative impact of public and employer attitudes toward persons with disabilities. Such attitudes have multiple dimensions, including feelings of discomfort in associating with disabled individuals, [and] inaccurate assessments of their productivity . . . [State officials] expressed strong distress at the prominence of these attitudes and the difficulty in changing them. [*Id.* at 73].

Other studies before Congress reached similar conclusions. A study commissioned by the U.S. Department of Labor had reported, in 1969:

> In general, observations made during the field research suggested that job opportunities for the handicapped were even more circumscribed in the public than in the private sector, except for such model programs as the Federal government program for hiring the mentally retarded. While state and local governments are becoming increasingly important as employers, their policies on hiring the handicapped are not improving accordingly. . . . [M]any have rigid physical examination requirements which may be quite irrelevant to the demands of the jobs in question. . . . These requirements appear to be based on outmoded assumptions about the capacities of the handicapped and also on the belief that there are widespread aversions to visible handicaps which would lower public confidence in the employee.[25]

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[25] Greenleigh Associates, Inc, *A Study to Develop a Model for Employment Services for the Handicapped* (1969), at 121-22, cited in testimony to Congress at 2 LH 1621-22. A 1972 study by the Texas Rehabilitation Committee made similar findings with respect to state employment in Texas. Texas Rehabilitation Commission, *Excerpts & Recommendations from the Workplace for Placement of the Handicapped in State Government Service* 1-5 (1972). The report found, *inter alia*, that "front-line surpervisors" had "qualms" about working with persons with

Congress was advised of a study of 23 public jurisdictions showing, *inter alia*, that none was willing to hire blind applicants; that many excluded applicants with a history of cancer; and that one even had a written standard prohibiting the hiring of an amputee for any job unless he or she made use of a prosthesis, even though it might not be required for success on the job. *Hearing on S. 557 Before the Senate Comm. On Labor and Human Resources* 80 (March 19, 1987). Still another study, conducted by the American Cancer Society, found that most government agencies in California discriminated in hiring of applicants for an average of five years after treatment for cancer. 2 LH 1619. On the basis of these and other sources, Congress found that "there still exists widespread irrational prejudice against persons with cancer." S.Rep. 39-40.[26] *See also*, this Court's observation in *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987), a public employment disability discrimination case, that "[e]ven those who suffer or have recovered from such noninfectious diseases as epilepsy or cancer have faced

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disabilities, and that there was a "social stigma" that deterred hiring of such persons. And an in-depth study of state employment in New York after enactment of the ADA showed that these problems have persisted even after the ADA's enactment. Sharon L. Harlan and Pamela M. Robert, *Disability in Work Organizations: Barrier to Employment Opportunity, Final Report*, at xiii, University at Albany, State University of New York (November 1995) (finding that persons with disabilities seeking employment with the State "confront stereotypes, ignorance, misinformation, fear and pity that impede progress toward equal opportunity").

[26] Respondent Patricia Garrett alleges that she has been the victim of just such irrational prejudice. See also, B. Hoffman, *Employment Discrimination Based on Cancer History: The Need for Federal Legislation*, 59 Temple L.Q. 1, 2-9 (1986) (describing reasons for employment discrimination against persons with cancer histories, and finding that such discrimination exists in both public and private employment).

discrimination based on the irrational fear that they may be contagious." 480 US at 284 (footnote omitted).

Congress also took note of the report of President Bush's Commission on the HIV Epidemic on the need for legal constraints to prevent discrimination against persons with HIV. S. Rep.19. *See also*, 3 L. H. 1995.

Witnesses recounted specific instances of exclusion of persons with disabilities from public employment based on aversion and irrational fear. The Committee Reports note "a case in which a woman 'crippled by arthritis' was denied a job, not because she could not do the work but because 'college trustees [thought] normal students shouldn't see her'." S.Rep. 7; H.Rep. (pt.2) 30); and another in which a person was denied a public school teacher job because she was in a wheelchair, *id.* Congress heard testimony that a professor of veterinary medicine at a state university was fired when it was discovered that he had AIDS.[27] Senator Durenberger told of a highly qualified applicant who was turned down for a job at a public hospital because "her fellow employees would not be comfortable working with a person as disabled as you are." 136 C.R. S9688. Additional instances were cited in a report of the US Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* at 21 (1983) (Alabama National Guard officer terminated with no benefits when it was learned that he had been diagnosed with depression and anxiety some 25 years earlier); *id.* (laborer employed by State Conservation Corps subjected to workplace harassment and public ridicule by superior because of his mental retardation); *id.* at 22 (city bus driver subjected to supervisory harassment, ridicule, and pressure to resign because of mental illness).

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[27] *Americans with Disabilities Act: Hearing on S. 933 Before the Senate Comm. on Labor and Hum. Resources*, 101st Cong. 404 (May 9, 1989) (testimony of National Organizations Responding to AIDS).

Congressman Major Owens, who chaired an ADA subcommittee, appointed a Task Force, which conducted 63 public forums and compiled and submitted to Congress a documentary record of personal accounts of disability discrimination. 2 LH 1324-25, 1336, 1389.[28] A number of the accounts describe instances of discriminatory conduct in State and local government employment. We recite a few in the margin.[29]

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[28] The record presented to Congress is now in the possession of the President's Committee on Employment of People with Disabilities. See, Jonathan M. Young, *National Council on Disability, Equality of Opportunity: The Making of the Americans with Disabilities Act*, at App. E (1997). We have lodged with the Clerk copies of those cited in n.29, *infra*. They are cited by State, and the number of the cited document within that State's folder.

[29] A health administrator walked into a job interview with a department head at the University of North Carolina, who immediately said, "Ah----- if I knew you were blind I wouldn't have bothered bringing you in for an interview." N.C. 173. A student at a state university was denied the ability to practice teach and thus earn his teaching certificate because "[t]he Dean of the School of Education at that time and his successor were convinced that blind people could not teach in public schools." SD 57. A microfilmer at the Kansas Department of Transportation was fired "for the stated reason that I have epilepsy" despite exceeding the department's daily output requirement. KS 3. "Deaf workers at the University of Oklahoma are being paid a lower salary than their Hearing workers and are required to perform the same work. . ." OK 26. The State of Indiana's personnel office informed a woman with a hidden disability that she should not disclose her disability if she wanted to obtain employment. IN 7. A blind state college administrator prevailed on a disability discrimination claim when he was not rehired despite positive evaluations. MA 9. Despite having a higher score for training and experience than the sighted person who was hired, a blind applicant was denied the position of Director of State Services for the Blind. MN 13. A teacher was denied a permanent position because she wears braces and walks with canes. MS 33. A lifeguard who worked for three summers at a city pool was denied a permanent job because he had epilepsy; he had not had a seizure since childhood. GA 4. A job seeker looking for a position with a public library was told, "they had already hired someone with a disability and they had

Numerous additional instances of invidious discrimination in public employment were described in published lower court decisions predating the ADA. We describe some of these in the margin.[30]

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met their quota." WI 55. A municipality initially told a summer job applicant that he would not be interviewed because he was in a wheelchair and then gave him a different interview than other applicants. AK 30. A blind teacher repeatedly has been told that she is not qualified for a position because the school needs a football coach; "In each case, a sighted person, who does not coach football, has been hired." UT 75. A teacher's aide with a visual impairment was told "point blank that the reason I wasn't hired to work with children was because of the way my eyes were, that the children would, 'try to imitate me.' " IL 151. One writer summed up his experience, "rather than relate one specific example, as a state employee I daily see covert discrimination in hiring or not hiring people with disabilities with no reason given specifically." SD 46.

[30] *Chalk v. United States Dist. Ct. Cent. Dist. of Cal.*, 840 F.2d 701, 711 (9th Cir. 1988) (reversing denial of injunction sought by teacher with AIDS who was excluded from classroom teaching, and noting that "to allow the court to base its decision on the fear and apprehension of others would frustrate the goals of section 504."); *Pushkin v. Regents of the Univ. of Colo.*, 658 F.2d 1372, 1387 (10th Cir. 1981) (upholding injunction granting doctor with multiple sclerosis admission to psychiatry residency program, and noting that the Chairman of the Department stated that Dr. Pushkin "is teachable, but to face the devastation, guilt, pity and rage that can be stirred up in his patients by his physical condition appears to be too much to ask of his patients or of him."); *Recanzone v. Washoe County Sch. Dist.*, 696 F. Supp. 1372 (D. Nev. 1988) (highly praised substitute teacher with no right hand, a left hand with three digits, and a speech impediment prevailed on a discrimination claim that she was denied a permanent contract while less qualified, non-disabled candidates were granted such contracts); *Gurmankin v. Costanzo*, 411 F. Supp. 982, 987 (E.D. Pa. 1976) (holding unconstitutional school district's initial policy of totally excluding blind persons as teachers. Court also found that teacher's evaluation was based "on misconceptions and stereotypes about the blind and on assumptions that the blind simply cannot perform . . ."), *aff'd*, 556 F.2d 184 (3d Cir. 1977).

2. Evidence of the Causes of Prejudice Against Persons with Disabilities

In determining the pervasiveness of disability discrimination in public employment, Congress was entitled to—and did—draw the appropriate inference that the incidents brought to public notice were but the tip of an iceberg. The "record" could include only the situations of those who (a) knew what motivated their adverse employment incidents, and (b) chose either to sue or to publicly testify about the embarrassing details. Congress, as we describe, had abundant evidence that these were not isolated incidents, but rather manifestations of the deeply-rooted prejudices against persons with disabilities that are endemic in our society and "carry over into the conduct of public agencies." ACIR Rep. at 56.[31]

Congress identified the root causes of disability discrimination. It is "based on false presumptions, generalizations, misperceptions, patronizing attitudes, ignorance, irrational fears, and pernicious mythologies." S.Rep. 7. "Every government and private study on the issue has shown that employers disfavor hiring persons with disabilities because of stereotypes, discomfort, misconceptions, and unfounded fears about increased cost and decreased productivity," and "pervasive bias." *Id* at 37. *Accord:* H.Rep. (pt.2) 40 ("stereotypical assumptions, fears and myths"); *id* at 71 ("pervasive bias"); *id* at 75 ("widespread, irrational prejudice"); H.Rep. (pt. 3) 31 ("stereotypes, discomfort, misconceptions"). These findings paralleled this Court's observation in *Arline*, cited in the Committee reports, that "society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." 480 US at 284, *cited in*

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[31] The quote referred to both Federal and State employment. *See also*, *id* at 69, 75.

H.Rep. (pt2) 53; S.Rep. 24.[32] These large engines of prejudice, Congress recognized, had generated an immense and intractable disability discrimination problem.

Congress' findings as to the root causes of disability discrimination rested on a firm evidentiary base.[33] Congress relied heavily on a report prepared by the U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* (1983) (hereinafter "*Spectrum*").[34] That report, drawing on extensive professional literature, detailed four "major types" of "prejudice" that persons with disabilities encounter. *Id* at 22-27. Governmental action disadvantaging persons with disabilities that is animated by any of these four violates the Equal Protection Clause, as we next show.

(a) ***Discomfort/Aversion:*** "Psychological studies indicate that interaction with handicapped people, particularly those with visible handicaps, commonly produces feelings of discomfort and embarrassment in nonhandicapped people . . .

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[32] See also, ACIR Report, at 20, described in congressional testimony at 2 LH 1614:

> Probably the most significant barriers faced by persons with disabilities relate to the attitudes, predispositions, and behaviors of nondisabled persons. Such attitudes range from negative views of disability to discomfort in associating with people who experience some form of disability. The nature and extent of attitudes about disability have been documented through an extensive set of research studies conducted in many settings. One common finding is that nonhandicapped people tend to be preoccupied with disabling conditions and often are incapable of seeing beyond these conditions to the whole person. . . . Such predispositions lead nondisabled persons to overlook and ignore the full range of abilities of persons with disabilities.

[33] A more comprehensive recitation of the evidence supporting Congress' findings on the causes of prejudice against persons with disabilities appears in the Brief Amicus Curiae of Paralyzed Veterans of America, et al, in Support of Respondents.

[34] S.Rep. 6; H.Rep. (pt.2) 28.

[H]andicapped people encounter the reaction of aversion every day." *Id* at 23.

Adverse governmental actions against persons with disabilities motivated by these feelings violates the Equal Protection Clause, as *Cleburne* holds. 473 US at 448-49. *See also, O'Connor v Donaldson*, 422 US 563, 575 (1975) (noting that state may not "fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different"); *Watson v Memphis*, 373 US 526 (1963) (holding public discomfort with a minority's perceived differences an unconstitutional ground for state action).

(b) ***Stigmatization:*** "A handicapping condition is frequently, albeit illogically, viewed as a blameworthy characteristic or a badge of disgrace," and one who possesses that condition "as not quite human." *Spectrum*, at 26. "The professional literature is full of discussions about the stigma associated with handicaps," *id*; *see also*, ACIR Rep. at 20. As Congress noted, "our society is *still* infected by the ancient, now almost subconscious assumption that people with disabilities are less than fully human." S.Rep. 8-9 (quoting Justin Dart).[35]

Governmental action motivated by these negative, stigmatizing attitudes is at the very core of what the Fourteenth Amendment forbids. *New York City Transit Authority v Beazer*, 440 US 568, 593 n.40 (1979) (citing cases).

(c) ***Stereotyping:*** Congress found that it was "strikingly clear" from the evidence it received at the ADA hearings that "stereotypes and misconceptions about the abilities, or more correctly the inabilities, of persons with disabilities are still pervasive today." S. Rep. 37. Many of the widely-held stereotypes about persons with disabilities are simply myths,

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[35] Just how much "less than human," *see* S.Rep. 7 (zookeeper barred children with Downs Syndrome, because he feared they would frighten the chimpanzees).

such as the ones that epilepsy and cancer are contagious, cited in *Arline*, and the one that the HIV virus is transmittable by casual contact.

Other common disability stereotypes consist of false generalizations attributing negative characteristics to persons with disabilities as a class, when, in fact, those characteristics are no more prevalent among that class than among the population at large. The Senate Report, at 28-29, addressed the false "group based fears" phenomenon by describing a 1973 study that had "examined the job performance, safety record and attendance of 1,452 physically impaired employees of E.I. duPont de Nemours and Company" in order to "determine the validity of several concerns express by employers with regard to hiring veterans with disabilities," *id.* at 28. The duPont study found that: as to each of these concerns "the disabled workers performed as well as or better than their non-disabled co-workers." [*Id* at 28-29].[36]

Nonetheless, as the ACIR found 16 years later, employment discrimination against persons with disabilities based on "false stereotypes" persisted in the public sector. ACIR Report, at 72-73. That Report explained:

> The reluctance of employers to hire persons with disabilities is rooted in common myths and misunderstandings, including the notions that the employment of disabled workers will increase insurance

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[36]Some specific findings of the study were as follows:

> Ninety-one percent of Du Pont's disabled workers rated average or better in performance.
>
> Only four percent of the workers with disabilities were below average in safety records; more than half were above average.
>
> Ninety-three percent of the workers with disabilities rated average or better with regard to job stability (turnover rate).
>
> Seventy-nine percent of the workers with disabilities rated average or better in attendance. [S.Rep. 29]

> and worker compensation costs, lead to higher absenteeism, harm efficiency and productivity, and require expensive accommodations.
>
> . . . . These attitudes, common to many employers in the United States, have persisted despite empirical evidence from several quarters that disabled workers perform at levels equal to or superior to other employees. [ACIR Report, at 21].

Denying persons with disabilities equal access to the workplace on the basis of myths or false generalizations plainly violates the Equal Protection Clause. *Cleburne*, 473 US at 449 (finding zoning ordinance excluding group homes for persons with mental retardation violative of Equal Protection Clause when predicated on city's belief that persons with mental retardation create a "special hazard," disturb the "serenity of the neighborhood," and pose "danger to others," yet fraternity houses and college dormitories that pose similar dangers are allowed; "[i]t is difficult to believe that the groups of mildly or moderately mentally retarded individuals who would live at 201 Featherston would present any different or special hazard."). *See also*, *Olmstead*,527 US at 612 (Kennedy, J., concurring) (indicating that treating persons with disabilities differently from the public generally "without adequate justification" is discrimination).

Nothing said by this Court in *Kimel* is to the contrary. The Court there addressed a conceptually different kind of generalization—one that, while not true of every individual in the class or group, is recognized as being true on average, *viz*, that older workers on average would be less productive than younger workers on average. 120 S.Ct. at 646 (quoting *Vance v. Bradley*, 440 U.S. 93, 108 (1979)). And, the Court dealt there with a class (older persons) which had not been subject to a history of invidious discrimination. *Id* at 645 (*quoting Massachusetts Bd. Of Retirement v Murgia*, 427 US 307, 313 (1976)). In that context, the Court held that action in reliance

on such a generalization has a rational basis. 120 S.Ct. at 646-47. *Kimel* does not remotely suggest that action taken in reliance on a myth, or on a stereotype that wrongly attributes to a historically disfavored class a characteristic no truer of that class than of the public at large, has a rational basis. And, of course, *Cleburne* belies just that proposition, as does *United States v Virginia*, 518 US 515, 541 (1996).

(d) ***Patronization.*** Often, persons with disabilities suffer from actions that "spare" them the "rigors" of ordinary life that, in fact, they earnestly desire to confront and that they are fully capable of handling. *Spectrum*, at 24. And Congress concluded from its ADA hearings that "[i]t is critical that paternalistic concerns for the disabled person's own safety not be used to disqualify an otherwise qualified applicant [for employment.]" S.Rep. 38.

However "well-intentioned," such paternalism is another form of unconstitutional discrimination. "Traditionally, [gender] discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." *Frontiero v Richardson*, 411 US 677, 684 (1973) (plurality opinion). *See,United States v Virginia*, 518 US at 538, 549-50 & n.20.

3. Evidence of Prejudice in State Actions Apart from Employment

The evidence before Congress showed widespread governmental discrimination against persons with disabilities in areas other than employment. Congress found that there continued to be pervasive public disability discrimination in the "critical areas" of institutionalization, education, voting, and access to public services generally. § 12101(a)(3).[37]

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[37] Congress was not alone in making these findings. A report of the [California] Attorney General's Commission on Disability, California Dept. of Justice, *Final Report* (1989), issued while Congress was considering the ADA, found that agencies of the California government "continue to use unfair social policies premised on paternalism and

Those findings were solidly based. The fact that disability prejudice was operative across this wide range of State services informed Congress' judgment of the dimensions of disability discrimination in public sector employment. For the logic is compelling that state actors with employment responsibilities are not distinct in this regard from state actors with institutionalization, education, electoral and public service responsibilities.

Our description of the evidence in other areas is truncated, given that this is an employment case. A fuller account appears in the Brief of Morton Horwitz [and] Other Historians and Scholars as Amici Curiae in Support of Respondents.

In *Spectrum*, the Civil Rights Commission provided Congress an extensive, carefully documented account of the history of public mistreatment of persons with disabilities, and its current consequences. The Commission demonstrated, with supporting chapter and verse, that "[i]nstances of ridicule, torture, imprisonment, and execution of handicapped people throughout history are not uncommon, while societal practices of isolation and segregation have been the rule." *Spectrum*, at 18.

In the late 1800s and early 1900s, States erected institutions to house great numbers of people with disabilities "to protect society from disabled people." *Id.* at 19. By the 20th century, State institutionalization had become society's systemized response to its unwillingness to integrate persons with disabilities, often coupled with forced sterilization programs, initiatives that are "still pursued today" in some States. *Id* at 34-37.

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discriminatory attitudes which effectively exclude people with disabilities from full participation in community life," *id* at 57. The Commission reported many "disturbing accounts of discrimination in community and State Colleges and Universities," *id* at 138.

The Commission's report documents extensive discriminatory conduct in the form of continued exclusion and segregation in education. Even in present times, "[t]he ways in which handicapped children have been denied equal educational opportunity are legion." *Id.* at 28.[38]

Similarly, architectural barriers have taken a variety of forms and continue to present a serious problem to people with mobility impairments. Despite laws establishing access guidelines, there is much resistance, in part because "designers, by and large, have responded to them with hostility." *Id.* at 38. The failure of States to comply with laws requiring accessibility for persons with disabilities was documented in ACIR Rep., at 79-88. State officials surveyed by ACIR attributed the delinquency in part to negative attitudes toward persons with disabilities, *id* at 87.

The Civil Rights Commission reported that States are also still notorious for denying other basic rights to persons with disabilities that most people take for granted.

> These include the right to vote, to hold public office, and to obtain a driver's or hunting or fishing license. Many States restrict the rights of physically and mentally handicapped people to marry and to enter into contracts. . . . Based on the fact that they are handicapped, parents have had custody of their children challenged in proceedings to terminate parental rights and in proceedings growing out of divorce. [*Spectrum* at 40.]

Judicial decisions provide myriad additional examples of State and local discrimination against persons with disabilities of a kind that violates the Fourteenth Amendment (given the existence of statutory bans, many of these decisions do

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[38] In 1975, Congress found that one million children with disabilities were excluded from the public school system. 20 USC § 1400(b) (Supp IV 1980). *Id.* at 27.

not address the constitutional issue in terms). We cite some in the margin.[39]

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[39] **Housing and Zoning.** *J.W. v. City of Tacoma*, 720 F.2d 1126, 1129 (9th Cir. 1983) (finding it highly likely that Tacoma ordinance was based on prejudices against persons who have been institutionalized for mental health treatment, and noting the prevalence of social stigma and irrational fear); *Baxter v. City of Belleville*, 720 F. Supp. 720, 732 (S.D. Ill. 1989) (finding that "irrational fear of AIDS" was a motivating factor of the city's refusal to grant a special use permit); *Burstyn v. City of Miami Beach*, 663 F. Supp. 528, 536-37 (S.D. Fla. 1987) (finding that "fear and prejudice" motivated passage of ordinance restricting housing for people with physical or mental impairments).

Education. *New York State Ass'n for Retarded Children v. Carey*, 612 F.2d 644, 651 (2d Cir. 1979) (concluding that segregated facilities for mentally disabled children infected with the hepatitis virus "will reinforce the stigma to which these children have already been subjected."); *Panitch v. Wisconsin*, 444 F. Supp. 320, 322 (E.D. Wis. 1977) (finding that state and local school district officials intentionally discriminated against students with disabilities by delaying implementation of statutes which would have otherwise provided the students with an education); *Mills v. Board of Educ. of the Dist. of Columbia*, 348 F. Supp. 866, 870 (D.D.C. 1972) (finding that D.C. Board of Education "entirely excluded from all publicly supported education" children with mental disabilities and other behavioral problems); *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279, 294-95 (E.D. Pa. 1972) (challenging statutory exclusion of about 50,000 children with mental retardation from any education in Pennsylvania; court recounted history of Eugenics movement and lingering stigmatization of children with mental retardation, which some parents likened to a "sentence of death"). Numerous decisions detail the prejudice and fear motivating exclusion of children with AIDS from the classroom. *See*, e.g., *Doe v. Dolton Elementary Sch. Dist. No. 148*, 694 F. Supp. 440, 444, 448-49 (N.D. Ill. 1988); *Robertson v. Granite City Community Unit Sch. Dist. No. 9*, 684 F. Supp. 1002, 1006-07 (S.D. Ill. 1988); *Ray v. School Dist. of Desoto County*, 666 F. Supp. 1524, 1535 (M.D. Fla. 1987); *Thomas v. Atascadero Unified Sch. Dist.*, 662 F. Supp. 376, 382 (C.D. Cal. 1986).

Voting. *Carroll v. Cobb*, 354 A.2d 355, 357 (N.J. Super. Ct. App. Div. 1976) (noting trial court's determination that residents of state facility for the mentally retarded were denied the right to register to vote due to "the hostility that the Municipal Fathers and even the County Board of

C. Congress Correctly Found that State Disability Laws Did Not Solve the Problem

Petitioners (Br. 32, 33, 37) place great weight on the argument that State laws forbidding disability discrimination at the time the ADA was enacted demonstrate that state action

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Election had against people who were confined to such a school."). *See also, Manhattan State Citizens Group, Inc. v. Bass*, 524 F. Supp. 1270, 1275 (S.D.N.Y. 1981); *Boyd v. Board of Registrars of Voters of Belchertown*, 334 N.E.2d 629, 632 (Mass. 1975).

Opportunity to Adopt and Raise Children. *In re Marriage of Carney*, 598 P.2d 36, 42 (Cal. 1979) (court condemned trial court's preconception that father with quadriplegia was "deemed forever unable to be a good parent simply because he is physically handicapped," and stated that "[l]ike most stereotypes, this is both false and demeaning."); *Richardson v. Los Angeles County Bureau of Adoptions*, 59 Cal. Rptr. 323, 327-29 (Cal. Ct. App. 1967) (holding that trial judge violated the constitution by acting on the basis of "bias" and "prejudice" when he summarily denied adoption because petitioners were deaf); *In re Marriage of R.R.*, 575 S.W.2d 766, 768 (Mo. Ct. App. 1978) (reversing trial judge's order, which awarded custody of children to mother, despite finding her "immoral" and "dishonest," because of unsubstantiated fear that the children would be "emotionally damaged because of [their father's] handicap," multiple sclerosis, which required the use of a wheelchair).

Mistreatment in State Institutions. Courts have documented terrible abuses of persons with disabilities in institutions. In Petitioners' State, *see Wyatt v. Stickney*, 344 F. Supp. 387, 391, 391 n.7 (M.D. Ala. 1972) (finding conditions at institution for people with mental retardation "grossly substandard." Testimony indicated that the administration and programs "hark back to decades ago when the retarded were misperceived as being sick, as being threats to society, or as being subhuman organisms."), *aff'd in relevant part*, 503 F.2d 1305 (5th Cir. 1974). *See also, Thomas S. v. Flaherty*, 699 F. Supp. 1178, 1185-99 (W.D.N.C. 1988), *aff'd*, 902 F.2d 250 (4th Cir. 1990); *Halderman v. Pennhurst State Sch. & Hosp.*, 446 F. Supp. 1295, 1306B09 (E.D. Pa. 1977), *aff'd in relevant part*, 612 F.2d 84 (3d Cir. 1979), *rev'd on other grounds*, 451 U.S. 1 (1981); *New York Ass'n for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752, 756 (E.D.N.Y. 1973); *Leach v. Shelby County*, 891 F.2d 1241, 1247 (6th Cir. 1989); *Parrish v. Johnson*, 800 F.2d 600, 603 (6th Cir. 1986).

toward persons with disabilities based on prejudice was a thing of the past and thus pretermitted the need for an ADA. This flawed argument cannot possibly bear that weight.

First, the description of State laws in Petitioners' Appendix A and of their efficacy is grossly inaccurate.[40] Congress had before it the far different and far more accurate assessment of the "50 State Governors' committees. . . who report that existing state laws do not adequately counter such acts of discrimination," S.Rep 18. The evidence before Congress of pervasive contemporary governmental disability discrimination was dramatic confirmation of that assessment, and Congress concluded that "[s]tate laws are inadequate." *Id.*

A 1986 study of state laws found that only eight states had substantive provisions as protective as the federal Rehabilitation Act, Janet A. Flaccus, *Handicap Discrimination Legislation: With Such Inadequate Coverage at the Federal Level, Can State Legislation Be Any Help?* 40 Arkansas L.Rev. 261, 322 (1986),[41] and Congress also concluded, from the massive evidence of continuing disability discrimination, that the Rehabilitation Act "is also inadequate." S.Rep. 18.

As a White House Conference on Handicapped Individuals had concluded, "[t]he entire . . . record overwhelmingly reflects that formal articulation of a right is one matter; the general enjoyment of that right is quite another."[42] In that

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[40] A state-by-state account of those inaccuracies appears in Brief for the National Association of Protection & Advocacy Systems, *et al*, as Amici Curiae in Support of Respondents, at Appendix A.

[41] Congress was informed of this study at the hearings (2 LH 1641). Because the Rehabilitation Act covered only employers who receive federal funds, most state laws covered a larger number of employers, albeit with weaker protections.

[42] White House Conference on Handicapped Individuals, Volume Three: Implementation Plan, 61 (1978).

regard, it was Congress' legislative conclusion that prophylactics against pretextual decisionmaking are required if discrimination that is invidiously motivated is to be rooted out (S.Rep. 37; H.Rep. (pt.2) 71), and such prophylactics are provided in the employment provisions of the ADA. (We discuss these infra, at 39-47.) But many state laws did not contain any such prophylactic, and virtually none contained the range provided in the ADA.[43]

Second, and related, the adoption of State laws banning disability discrimination does not wash away all the state actor hostility toward persons with disabilities. These laws, whatever their insufficiencies, do, of course, suggest that state *legislators* are not hostile to persons with disabilities. But most disability discrimination comes, as in the two cases here, from *ad hoc* decisions made by individual personnel officers and supervisors. As the ACIR learned *from State officials*, the "negative attitudes" and "stereotypes and misconceptions" that are the stuff of State employment discrimination against persons with disabilities come from "the middle management level where most employment decisions are made." ACIR Rep. 73. *See also*, *id* at 75; Texas Report, *supra* n.25; *Watson v. Fort Worth Bank & Trust*, 487 US 977, 990 (1988) (noting that while top executives may be well intentioned, "[i]t does not follow . . . that the particular supervisors to whom . . . discretion is delegated always act without discriminatory intent.")

Congress had every reason to believe, as the evidence before it showed, that such State actors, who are not in the public spotlight, and do not document their decisional rationales, had not been deterred by (and would not in the future be deterred by) the limited legislation then on the

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[43] For example, nearly half the states at the time the ADA was enacted had no reasonable accommodation requirement. Flaccus, 40 Ark. L. Rev. at 309, and many others had very weak accommodation provisions, *id* at 306-09.

books. And, as this Court's decisions make clear, "the adequacy of . . . alternative remedies" is a judgment that Congress is best situated to make, and one to which the courts owe substantial deference. See p. 14, supra. This is especially so with respect to disability law, where, as this Court has recognized, the legislature's superior institutional capacity is at its zenith. *Cleburne,* 473 US at 443:

> How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps uninformed opinions of the judiciary.

II. THE ADA IS CONGRUENT AND PROPORTIONAL TO THE PROBLEM

Congress' broad Fourteenth Amendment §5 power "to enforce" the Equal Protection Clause, as we have noted, is not so broad as to be "the power to determine *what constitutes* a constitutional violation," *Kimel*, 120 S.Ct. at 644 (emphasis in original). But it is not so narrow and insignificant as to be a power, scarcely warranting the term "legislative," to "merely parrot [ ] the precise wording of the Fourteenth Amendment." *Id.* To the contrary, Congress most assuredly has the § 5 power to enact "prophylactic legislation" that is an "appropriate remedy to a difficult and intractable problem" including, most particularly, the problem of a "pattern" of discrimination by the states "at the level of constitutional violation." *Id* at 648-49. And, under the *Boerne/Kimel* test, §5 prophylactic legislation is an "appropriate" remedy to the problem when there is "congruence and proportionality between the injury to be prevented and the means adopted to that end." *Id* at 644.

Our showing in Part I has been that on the basis of the comprehensive record before it Congress had every reason to believe, and so found, that there was a pattern of

unconstitutional State and local government discrimination against persons with disabilities rooted in the most deep-seated prejudice. Given its nature and dimension this discrimination is precisely the kind of difficult and intractable problem that does not bow to a simple general anti-discrimination command and that the Legislative Branch is empowered to determine requires "strong measures" constituting a "powerful" remedial response. *Kimel*, 120 S. Ct. at 648. The ADA's substantive provisions, as Congress crafted them, are such a response—carefully tuned to the problem and carefully measured so as not to intrude unnecessarily on the States' legitimate interests as employers.

The ADA's employment provisions take the form of a general ban on discrimination based on disability elaborated by a set of discrete requirements aimed at practices that experience indicated were likely to manifest disability prejudice and to serve as a means to effectuate disability discrimination. We show now that each of these, and all together, are a congruent and proportional response to the problem Congress found.

A. Each of the Employment Provisions of the ADA Serves an Important Prophylactic Function

1. The General Rule § 12112(a) contains a "general rule" that employers are not to engage in employment discrimination against a qualified individual with a disability "because of the disability of such individual." This general rule, in its terms, is addressed to State employment actions that are unconstitutional under such Equal Protection Clause decisions as *Cleburne*, and, in its most literal and limited sense, is a rule that "enforces" the guarantees of the Fourteenth Amendment. The Fourteenth Amendment does not, standing alone, confer a cause of action upon individuals who suffer constitutional violations, and States are not "persons " suable under 42 USC §1983, *Will v. Michigan*

Dept. of State Police, 491 US 58 (1989). As Congress had strong evidence of such State employment discrimination, the provision creating that cause of action is the clearest example of proper §5 legislation.

2. Stereotypes. §12112(b)(1) declares that "discrimination" within the meaning of the statute includes:

> [L]imiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee.

The Senate and House reports make clear that this provision is aimed at the practice of making employment decisions based on disability-based stereotypes. The provision targets both the refusal to consider persons with disabilities for employment based on stereotypes and adverse treatment based on such stereotypes (such as separate lines of progression, pay scales, or work places for persons with disabilities). S.Rep. 28-29; H.Rep. (pt.2) 58; H.Rep. (pt. 3) 31, 36.

As we have shown, State action based on stereotypes that are totally false, or that attribute to a disfavored class characteristics that do not distinguish them from the rest of the public, are unconstitutional. But § 12112(b)(1), in addition to reaching such State action, goes a step further by banning State employment action based on all disability stereotypes, including the kinds of stereotypes that this Court declared in *Kimel* are not unconstitutional (i.e., stereotypes that are truer of persons with disabilities as a class than of others, although not applicable to each individual in the disfavored class). In the case of ADA, the provision and its consequent requirement of individual inquiry is an appropriate prophylactic.

Congress knew that that there was widespread invidious prejudice against persons with disabilities, and that

stereotypes used by State and local employers often were reflections of (or "covers" for) employment decisions based on disability prejudice or fear. See *supra* n. 25 [Greenleigh Study]. *See also, Arline*, 480 U.S. at 284-85; *Olmstead*, 527 U.S. at 611 (Kennedy, J. concurring) ("the line between animus and stereotype is often indistinct. . ."). Against this background, it was Congress' judgment that "individualized inquiry" is "essential" if the statute "is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear," *Arline*, 480 US at 287. This distinguishes the ADA in a crucial way from the ADEA, given this Court's conclusion in *Kimel* that older persons are not subjected to invidious discrimination.

3. Non-Job-Related Qualification Standards. Although not invoked by either of the plaintiffs in these two cases, there are three provisions of the ADA that ban rules and practices that screen out persons with disabilities and that are not job related and consistent with business necessity. § 12112(b)(3)(A) defines "discrimination" to include the use of "standards, criteria, or methods of administration ... that have the effect of discrimination on the basis of disability." §12112(b)(6) and (7) particularize this requirement as to "qualification standards, employment tests, or other selection criteria." These definitions are qualified by §§12113(a) and 12112(b)(6), which afford the employer a defense if it can show the use of the criteria to be "job-related and consistent with business necessity," and by §12113(b), which permits the use of qualification standards that disqualify individuals who would "pose a direct threat to the health or safety of other individuals in the workplace."

It is, to be sure, a staple of this Court's jurisprudence that the Fourteenth Amendment does not ban State action merely because of its disparate impact. *Washington v. Davis*, 426 U.S. 229. But this Court has also recognized that disparate impact can be an indicator that an improper discriminatory

purpose motivated selection of a facially neutral rule. *Reno v Bossier Parish Sch. Bd.*, 520 US 471, 489 (1997). In consequence, this Court has repeatedly recognized that, when confronting a problem of public discrimination fueled by prejudice against an unpopular group, "Congress can prohibit laws with discriminatory effects in order to prevent .... discrimination in violation of the Equal Protection Clause." *City of Boerne*, 521 US at 529, citing *City of Rome v United States*, 446 US 156 (1980). It follows, that in the same circumstance Congress can for the same preventive purpose prohibit state *practices* with discriminatory effects.

And that is precisely what the ADA Congress did. The Senate Report (at 37) explained that the purpose of the disparate impact provisions in the ADA is precisely to assure that facial neutrality does not shield invidious discrimination:

> The requirement that job criteria actually measure ability required by the job is a critical protection against discrimination based on disability. As was made strikingly clear at the hearings on the ADA, stereotypes and misconceptions about the abilities, or more correctly the inabilities, of persons with disabilities are still pervasive today. Every government study on the issue has shown that employers disfavor hiring persons with disabilities because of stereotypes, discomfort, misconceptions, and unfounded fears ....

Against that background, both the House and Senate Reports declare the prohibition aimed at practices with disparate effects to be one of three "pivotal" commands that "work together to provide a high degree of protection to eliminate the current pervasive bias against employing persons with disabilities in the selection process." S. Rep. 37; H.Rep (pt.2) 71. Congress' explanation parallels this Court's explanation of the similar provision in Title VII of the Civil Rights Act of 1964. *Watson*, 487 US at 990 (disparate impact analysis safeguards against decisions motivated by

discriminatory intent; and "*even if* one assumed that any such discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain") (emphasis added).

Of course, not every practice with disparate impact on persons with disabilities will be the product of conscious or subconscious prejudice. Congress so recognized, and through §§12112(b)(6) and 12113(a) and (b), exempted from the ADA's ban those rules and practices with disparate impact that are least likely to rest on disability prejudice: those where the employer has strong justification for using the criterion—business necessity or concern for safety.[44]

To be sure, even with these limits, the possibility exists that these disparate effects provisions will ban some facially neutral practices that in fact were not motivated by prejudice. But Congress, faced with sufficient evidence of a serious risk of unconstitutional behavior, and to assure against the underprotection of constitutional rights, may, as a prophylactic, ban facially neutral State practices that would not violate the Constitution unless badly motivated, and do so outright. Indeed, this Court on several occasions has upheld federal statutes that do so.[45] *A fortiori,* the ADA Congress

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[44] Moreover, only those claimants who can prove they are "qualified" for the job they are seeking are eligible to assert a claim under the ADA, so that decisions based correctly on lack of credentials (another common ground for rejection that is unlikely to be unconstitutional) are insulated from liability. *See* p. 6, *supra.*

[45] *South Carolina v Katzenbach*, 383 US 301 (upholding congressional ban on literacy tests for voting, although such tests violate Fifteenth Amendment only if badly motivated); *Katzenbach v Morgan*, 384 US 641 (upholding congressional ban on English-language eligibility requirement for voting, irrespective of whether the requirement was adopted with bad motive); *Oregon v Mitchell*, 400 US 112 (1970) (upholding nationwide ban on literacy tests for voting regardless of motive); *City of Rome v United States*, 446 US 156 (1980) (upholding ban on changes in electoral schemes with discriminatory effects, regardless whether State badly

was entitled to enact such a prophylactic ban tempered by a limited defense that saves some State practices, crafted so that it does not allow discriminatory conduct to be smuggled under its cover.

To say this is most emphatically not to say that Congress has the power to enact such a provision without a proper § 5 predicate. As *Kimel* shows, prophylactic § 5 legislation cannot stand where the evidence before Congress does not show a pattern of unconstitutional discrimination, or the likelihood of such discrimination. But in the ADA, Congress concluded, on the basis of a powerful record, that the danger of continuing unconstitutional discrimination was very great, and that a strong remedial response was needed. In that crucial respect, the ADA is different from the statutes that were held in *City of Boerne* and *Kimel*, not to be proper exercises of the § 5 power.

4. Reasonable Accommodation. §12112(b)(5)(A) defines "discrimination" to include:

> [N]ot making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity...

Reasonable accommodation is available only to applicants or employees who are otherwise qualified for the job. Even as to qualified applicants or employees, it is not an ADA violation to refuse an accommodation that would cause an "undue hardship" to the employer, defined as "requiring

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motivated in adopting the changes); *Lopez v Monterey County*, 525 US 266 (1999) (upholding prohibition on implementation of electoral changes without approval of U.S. Attorney General, regardless of whether changes are unconstitutional.)

significant difficulty or expense, when considered in light of" the "nature and cost of the accommodation," the financial impact on the employer, and the nature of the employer's operation. §12111(10).

Some persons with disabilities who are fully competent to perform a job need some adjustment of the work environment because of their disability. And it is an easy matter for a State actor who in fact is animated by disability prejudice, and not by concern about the often minor cost of providing the accommodation,[46] to conceal his or her true motivation by invoking the cost of accommodation as a "neutral" justification for denying employment opportunities to persons with disabilities. As EEOC Commissioner Evan Kemp testified, if employers "want[ ] disabled people, the accommodations really don't become a burden. If they don't, they always do." 2 LH 1552, quoted in H.Rep. (pt.2) 34 The ACIR reported to Congress that: "Sometimes the only real impediment [to accommodation] is the perception of the supervisor.... [A]rguments about accommodation costs are used as a smokescreen to mask the real reasons for not hiring a person with a mental or physical disability." ACIR Rep. at 75.

For these reasons, Congress concluded that the reasonable accommodation provision of the ADA is, along with the disparate impact provision, one of the "pivotal provisions" necessary "to provide a high degree of protection to eliminate the current pervasive bias against employing persons with disabilities..." S.Rep. 37. Congress had ample justification for this conclusion. This Court, in *Cleburne*, observed that "a

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[46] Congress found that "many typical accommodations" can be provided for under $50," although, of course, some required accommodations would be more expensive. S. Rep. 10. See also, ACIR Rept. at 73 ("studies show[ ] that most workplace accommodations involve little cost.") The accommodations sought by Respondent Ash reflect this.

civilized and decent society *expects*" its government to make some accommodation for the differences of persons with disabilities. 473 US at 444 (emphasis added). Given the pervasiveness of prejudice against persons with disabilities, when a state actor fails to do what a civilized and decent society expects, and cites costs that are not an undue hardship as the ground for rejecting the applicant who would otherwise be most qualified,[47] there is every reason to conclude that prejudice and not cost underlies the refusal.

Congress was also persuaded that the reasonable accommodation provision was necessary to assure that false stereotypes about disability not result in false assumptions of what it would cost to accommodate a person with disability and thus in resultant unwillingness to hire. "Stereotypes about disability can result in stereotypes about the need for accommodations, which may exceed what is actually required." H.Rep. (pt. 3) 39.

Here, then, as with disparate impact, Congress was warranted in concluding that discriminatory intent cannot be "adequately policed through disparate treatment analysis," and even if it could, "the problem of subconscious stereotypes and prejudices would remain." *Watson,* 487 US at 990. And, in acting on that understanding, Congress proceeded in a proportionate manner, limiting the scope of the reasonable accommodation provision so that it did not invalidate State action in those contexts where it was likely to be motivated by legitimate interests. Thus, an employer (1) need not even consider a candidate who is not qualified, (2) need not select a qualified candidate with a disability if even with reasonable

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[47] The reasonable accommodation provision does not oblige the employer to select a candidate with a disability, but only to evaluate his or her candidacy without taking into account the need to provide the reasonable accommodation. The candidate will be entitled to hire only if, with the need for accommodation removed from the calculus, he or she emerges as the best candidate.

accommodation he or she would not be the best candidate, (3) need not incur undue hardship, and (4) need not act in any way that would pose a direct threat to the health or safety of others.[48]

Congress expected that the constraints on discrimination imposed by the prophylactics described above would, in the long run, deter future discrimination in yet another way: as

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[48] There are four other substantive employment provisions in the ADA, whose role in preventing discrimination we discuss in this footnote. The Act bans preemployment inquiries of job applicants as to whether they have disabilities, and medical examinations prior to an offer of employment (which may be conditioned on satisfying a medical examination.) § 12112(d). Congress explained that these practices were "often used to exclude applicants with disabilities -- particularly those with so-called hidden disabilities such as epilepsy, diabetes, emotional illness, heart disease, and cancer -- before their ability to perform the job was even evaluated." S.Rep. 39. Banning them, until the employer is otherwise prepared to offer a job, "is critical to assure that bias does not enter the selection process." S.Rep. 39.

§12112(b)(2) forbids an employer's participating in a contractual or other arrangement with referral agencies, labor unions, and others, when such arrangements result in discriminatory selection or treatment of the employer's workforce. §12112(b)(4) forbids an employer's discriminating against an individual "because of the known disability" of another with whom the individual "is known to have a relationship or association." These provisions are aimed at deterring unconstitutional conduct in the same manner as those discussed in text.

Finally, §12203 forbids discrimination against an individual for opposing a practice made unlawful by the ADA, or for seeking legal remedy for such violations. The provision is obviously appropriate to assure that the central goals of the ADA are not eroded by employer coercion. Indeed, it may well be that a state's retaliating against an employee who seeks legal remedy from the federal government (as ADYS is alleged to have done to Respondent Ash) is a violation of the constitutional right to petition the federal government and/or of the individual's privileges and immunities of federal citizenship. See, *Nash v Florida Industrial Commission*, 389 US 235 (1967) (noting but not deciding the issue.)

employers became exposed to persons with disabilities through compliance with the ADA, they would be educated out of the stereotypes, prejudices, and discomfort that had become entrenched due to the absence of such persons in the workplace. Over time, with exposure, employers would hire persons with disabilities because they recognized their capacities and were not discomfited, and not simply to avoid violating the ADA.

As this Court noted in *Arline*, 480 US at 279, past discrimination against persons with disabilities had led to "erroneous but prevalent perceptions about the handicapped." Attorney General Thornburgh, testifying in support of the ADA, declared: "Attitudes can only be reshaped gradually. One of the keys to this reshaping is to increase contact between and among people with disabilities and their non-disabled peers." [49] The US Commission on Civil Rights told Congress that "[s]tudies suggest that increased positive interaction with handicapped people reduces fears and discomfort and leads to better acceptance of handicapped people." *Spectrum*, at 43. Representative Collins made the same point, noting that "only by breaking down barriers between people can we dispel the negative attitudes and myths," and predicting that employers would not apply false stereotypes if they *saw* the capabilities of persons with disabilities. 136 C.R. H2603. Senator Durenberger stated that the ADA will "remove the shades many of us wear, focusing on people's abilities rather than their disabilities." 135 C.R. S9688. And, Congress had clear evidence that employers who hired persons with disabilities quickly discovered that many of their stereotypical assumptions were entirely wrong. S.Rep. 28-29 (describing duPont's experience.)

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[49] ADA of 1988, Hearings Before the Senate Comm. on Labor and Human Resources, Subcomm. on the Handicapped, 101st Cong. 2d Sess. 202 (1989).

B. The Nationwide Scope of the ADA is Congruent and Proportional

In *Oregon v Mitchell*, eight Justices concluded that it is within Congress' Section 5 power to enact nationwide prophylactic provisions when the evidence before Congress suggests that a problem is widespread, even though Congress lacks specific evidence that every State has or is likely to engage in unconstitutional behavior.[50] The prevalence of disability prejudice that Congress found knows no geographic bounds, and Congress had evidence of discriminatory actions animated by that prejudice throughout the nation. See pp. 20-25 supra. Congress concluded from that evidence that there is a nationwide virus of prejudice: "our society is still infected by the .... assumption that people with disabilities are less than fully human," S. Rep. 8-9. It was more than reasonable for Congress to conclude that the prophylactics in the ADA should have nationwide application.

Petitioners fail to deal with *Mitchell*, or with the nature of the problem Congress was addressing in the ADA. Instead, they invoke passages in *City of Boerne* and *Kimel*, that disapproved the nationwide scope of the statutes in those cases. In each of those cases, however, the Court found that there was little if any evidence that *any* State had or was likely to violate the Constitution. In that setting, it is understandable that the Court found a nationwide ban incongruent. That is not the setting of the ADA.

C. The Absence of a Sunset Provision Is Not Fatal to Congruence or Proportionality

Petitioners argue that the ADA fails the congruence and proportionality test because it does not contain an automatic sunset provision. While that is a relevant factor to consider in evaluating congruence and proportionality, it is not a *sine qua*

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[50] 400 U.S. at 147 (Douglas, J., concurring); 216 (Harlan, J., concurring); 236 (Brennan, J., concurring); 283-84 (Stewart J., concurring).

non. City of Boerne, 521 U.S. at 533. In the case of the ADA, the persistence and prevalence of governmental discrimination against persons with disabilities, coupled with Congress' recognition that it would take a long time for greater interaction with persons with disability to rid the populace of the prejudice that fueled that discrimination, made selection of an automatic cut-off not sensible. The States have permanent institutions in Washington to represent their interests in Congress, and assuredly have no difficulty getting Congress' attention. If the day comes that the States think the ADA's ban on employment discrimination is no longer needed, they can be expected to invite consideration of its repeal. But that day has not yet arrived, as is evidenced by the decision of 42 States not to support Petitioner Alabama's quest in this Court.[51]

CONCLUSION

For the reasons set forth above, the decision below should be affirmed.

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[51] Although no State opposed enactment of the ADA, seven states, unhappy having to defend claims that they have violated the Act, have expressed "buyer's remorse" in an amicus brief supporting the Alabama agencies.

Respectfully submitted,

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APPENDIX

APPENDIX

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August 3, 2000

Prof. Michael Gottesman
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Dear Professor Gottesman:

This letter is to inform you that I was the Executive Director of the U.S. Advisory Commission on Intergovernmental Relations in Washington, D.C., from mid-1988 to mid-1994 and, therefore, the Executive Director at the time, April 1989, when the Commission issued its policy report A-111 entitled *Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal*. The Commission sent this report (A-111) to all the elected members of the United States Congress in May 1989.

Sincerely yours,

/s/ John Kincaid
JOHN KINCAID
Professor & Director

[Original Lodged with Clerk]

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In the Supreme Court of the United States

AUG 11 2000

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, ET AL., PETITIONERS

v.

PATRICIA GARRETT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether Titles I and II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12111 to 12117, 12131 to 12165 (1994 & Supp. IV 1998), are proper exercises of Congress's power under Section 5 of the Fourteenth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-48a) is reported at 193 F.3d 1214. The opinion of the district court (Pet. App. 49a-55a) is reported at 989 F. Supp. 1409.

JURISDICTION

The court of appeals entered its judgment on October 26, 1999. The petition for a writ of certiorari was filed on January 24, 2000, and was granted, limited to Question 1, on April 17, 2000. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. *Statutory Framework*: The Americans with Disabilities Act of 1990 (Disabilities Act), 42 U.S.C. 12101 *et seq.*, established a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Congress found that "historically, society has tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. 12101(a)(2). Discrimination against persons with disabilities "persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3). In addition, persons with disabilities

> continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services,

> programs, activities, benefits, jobs, or other opportunities.

42 U.S.C. 12101(a)(5).

Furthermore, "people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally." 42 U.S.C. 12101(a)(6). "[T]he continuing existence of unfair and unnecessary discrimination and prejudice," Congress concluded, "denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous." 42 U.S.C. 12101(a)(9). In short, Congress found that persons with disabilities

> have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

42 U.S.C. 12101(a)(7).

Based on those findings, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment" as authority for its passage of the Disabilities Act. 42 U.S.C. 12101(b)(4). The Disabilities Act targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131-12165, addresses discrimination by governmental entities in the operation of public services, programs, and activities, including transportation; and Title III, 42 U.S.C. 12181-12189 (1994 & Supp. IV 1998), addresses discrimination in public accommodations operated by private entities. The term "disability" is defined

as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual"; "a record of such an impairment"; or "being regarded as having such an impairment." 42 U.S.C. 12102(2).

This case involves suits filed under Titles I and II. Title I provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. 12112(a). A "covered entity" is defined to include state and local governments, 42 U.S.C. 12111(2), (5)(A) and (7); see *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 449 & n.2 (1976). "Discriminate" is defined to include "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of [a] disability," as well as the use of employment criteria that "screen out or tend to screen out" persons with disabilities, unless the criteria are "job-related for the position in question and [are] consistent with business necessity." 42 U.S.C. 12112(b)(1) and (b)(6). In addition, unlawful discrimination includes the failure to "mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability," unless the accommodation "would impose an undue hardship" on the employer. 42 U.S.C. 12112(b)(5)(A). A "qualified individual with a disability" is a person who "can perform the essential functions of the job" with or without reasonable accommodation. 42 U.S.C. 12111(8).

Title II of the Disabilities Act provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C.

12132. A "public entity" is defined to include "any State or local government" and its components. 42 U.S.C. 12131(1)(A) and (B).[1] A "[q]ualified individual with a disability" is a person "who, with or without reasonable modifications * * * meets the essential eligibility requirements" for the governmental program or service, including employment. 42 U.S.C. 12131(2); 28 C.F.R. 35.140.[2] Title II does not normally require a public entity to make its existing physical facilities accessible, although alterations of those facilities and any new facilities must be made accessible. 28 C.F.R. 35.150(a)(1), 35.151. Department of Justice regulations provide that, except for new construction and altera-

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[1] Congress extended the obligations of the Disabilities Act to itself and its instrumentalities in 1990. See Pub. L. No. 101-336, Title V, § 509, 104 Stat. 373, superseded by Pub. L. No. 104-1, Title II, §§ 201, 210, 109 Stat. 7, 13, currently codified at 2 U.S.C. 1311(a)(3), 1331(b)(1) (Supp. IV 1998); 42 U.S.C. 12209 (1994 & Supp. IV 1998). While the Disabilities Act does not apply to the executive branch of the federal government, virtually identical prohibitions are imposed by Sections 501, 504, and 505 of the Rehabilitation Act, which, since 1978, has governed "any program or activity conducted by any Executive agency," 29 U.S.C. 794(a) (1994 & Supp. IV 1998), and which subjects the federal government to Title I's standards, 29 U.S.C. 791(g), and remedies, 29 U.S.C. 794a(a)(1); 42 U.S.C. 1981a(a)(2). The principal distinction (see Pet. Br. 40) between the coverage of the States and the federal government is that, in the context of government programs other than employment, damages are available against the States under Title II of the Disabilities Act but are not available against the federal government. That is presumably because Congress believed it had greater direct authority over federal programs, through the use of its appropriations and oversight power, and thus less need of additional enforcement through private damages actions.

[2] Whether Title II covers the employment decisions of state and local governments is a question on which the circuits are divided. See *Davoll* v. *Webb*, 194 F.3d 1116, 1130 (10th Cir. 1999) (collecting cases). For purposes of the jurisdictional question currently before the Court, however, this Court may assume that the respondents have properly stated a claim under Title II. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998).

tions, public entities need not take any steps that would "result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. 35.150(a)(3); see also 28 C.F.R. 35.130(b)(7), 35.164; *Olmstead* v. *L.C.*, 527 U.S. 581, 606 n.16 (1999).

Both Title I and Title II may be enforced through private suits against public entities. 42 U.S.C. 12117(a), 12133. Congress expressly abrogated the States' Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 12202.

2. *Factual and Procedural Background:* Respondent Patricia Garrett alleges that, after working for the University of Alabama for 17 years, she was diagnosed with breast cancer. Garrett's supervisor made negative comments regarding Garrett's illness and "repeatedly threatened to transfer her to a less demanding job due to her condition." J.A. 38; Pet. App. 9a. Upon returning from medical leave, Garrett was advised that she would continue in her position. J.A. 39. However, a week later, the University demoted her even though she was able to perform the essential functions of her job. *Ibid*; Pet. App. 9a.

Respondent Ash alleges that he has worked for petitioner Alabama Department of Youth Services since 1993. He has diabetes and several respiratory impairments, including chronic asthma. Ash requested that the Department enforce its existing non-smoking policy and not require him to drive cars that leaked carbon monoxide fumes into the passenger compartment. The accommodations were denied, and, after respondent filed a complaint, petitioner took adverse employment action against him. J.A. 7-10.

Respondents filed separate suits in the same district court, alleging, as relevant here, that petitioners had violated Titles I and II of the Disabilities Act. Petitioners filed motions to dismiss on Eleventh Amendment grounds, which the district court granted. Pet. App. 49a-55a. The United

States intervened on appeal, pursuant to 28 U.S.C. 2403(a), to defend the Disabilities Act's abrogation of Eleventh Amendment immunity. Following circuit precedent, the court of appeals upheld the Disabilities Act's abrogation of Eleventh Amendment immunity. Pet. App. 6a.

SUMMARY OF ARGUMENT

Application of the Americans with Disabilities Act to States and their subdivisions falls squarely within Congress's comprehensive legislative power under Section 5 of the Fourteenth Amendment to prohibit, remedy, and prevent violations of the rights secured by that Amendment. After decades of legislative experience in the field, years of hearings and study, multitudinous submissions and testimonials by citizens across the Nation, and thoroughgoing congressional review, Congress determined that persons with disabilities faced a virulent history of official governmental discrimination, isolation, and segregation. Indeed, this Court's decisions have long acknowledged the pernicious history of mistreatment and discrimination suffered by persons with disabilities. Congress found, moreover, that, like race and gender discrimination, official segregation and discrimination against persons with disabilities have consequences that persist and have been perpetuated by state and local governmental decisionmaking, across the span of governmental operations.

Congress formulated a statute that, much like federal laws combating racial and gender discrimination, is carefully designed to root out present instances of unconstitutional discrimination, to undo the effects of past discrimination, and to prevent future unconstitutional treatment by prohibiting discrimination and promoting integration where reasonable. At the same time, the Disabilities Act preserves the latitude and flexibility States legitimately require in the administration of their programs and services. The Disabilities Act accomplishes those objectives by requiring States to afford

persons with disabilities genuinely equal access to employment opportunities, services, and programs, while at the same time confining the statute's protections to "qualified individual[s]," who by definition meet all of the States' legitimate and essential eligibility requirements. The Act simply requires "reasonable" accommodations for individuals with disabilities that do not impose an undue burden and do not fundamentally alter the nature or character of the governmental program. The statute is thus carefully tailored to prohibit only state conduct that presents a substantial risk of violating the Constitution or that unreasonably perpetuates the exclusionary effects of the prior irrational political, economic, and social segregation of persons with disabilities.

ARGUMENT

BECAUSE IT COMBATS AN ENDURING LEGACY OF UNCONSTITUTIONAL DISCRIMINATION AND SEGREGATION, THE AMERICANS WITH DISABILITIES ACT AS APPLIED TO THE STATES IS A VALID EXERCISE OF CONGRESS'S AUTHORITY UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT

Section 5 of the Fourteenth Amendment is an affirmative grant of legislative power to Congress, see *Kimel* v. *Florida Bd. of Regents*, 120 S. Ct. 631, 644 (2000), and encompasses all legislation reasonably designed to enforce the Fourteenth Amendment's guarantees, *Ex parte Virginia*, 100 U.S. 339, 345-346 (1880). Section 5 thus "gives Congress broad power indeed," *Saenz* v. *Roe*, 526 U.S. 489, 508 (1999), including the power to abrogate the States' Eleventh Amendment immunity, *Kimel*, 120 S. Ct. at 644. While, under Section 5, Congress may enact prophylactic and remedial legislation designed to enforce Fourteenth Amendment rights, there must be a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to

that end." *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997). The Disabilities Act is appropriate Section 5 legislation because it is predicated on a pervasive history of unconstitutional conduct by the States, which continues to infect contemporary governmental decisionmaking, and because the legislation is reasonably designed to remedy and prevent those constitutional violations.

A. Congress Found, After Exhaustive Investigation, Ample Evidence Of A Long History And A Continuing Problem Of Unconstitutional Treatment Of Persons With Disabilities By States And Their Subdivisions

At the core of the Equal Protection Clause is the principle that, in legislating or administering government programs, a "State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985). The Equal Protection Clause thus prohibits state action predicated on "mere negative attitudes" and "vague, undifferentiated fears," *id.* at 448-449, "divorced from any factual context from which we could discern a relationship to legitimate state interests," *Romer* v. *Evans*, 517 U.S. 620, 635 (1996). Petitioners draw from that standard the conclusion that the power of courts—and of Congress—to secure the constitutional rights of persons with disabilities is "virtually non-existent" (Pet. Br. 17); accordingly, petitioners characterize (*id.* at 30-39) the Disabilities Act as little more than the byproduct of an uninformed Congress overreaching to address a nonexistent problem of governmental discrimination against persons with disabilities, when "[t]he only real evidence" before Congress "was of States *overprotecting* the constitutional rights of the disabled" (*id.* at 38-39) (emphasis added). Nothing could be further from the truth.

1. Congress exhaustively studied the problem

The Congress that enacted the Disabilities Act brought to that legislative process more than 40 years of experience studying the scope and nature of discrimination against persons with disabilities and testing incremental legislative steps to combat that discrimination.[3] See *Fullilove* v. *Klutznick*, 448 U.S. 448, 503 (1980) (Powell, J., concurring) ("One appropriate source [of evidence for Congress] is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation. After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area.").

Building on that expertise, Congress commissioned two reports from the National Council on the Handicapped, an independent federal agency, to report on the adequacy of existing federal laws and programs addressing discrimination against persons with disabilities.[4] Those reports revealed that "the most pervasive and recurrent problem faced by disabled persons appeared to be unfair and unneces-

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[3] See, *e.g.*, Act of June 10, 1948, ch. 434, 62 Stat. 351 (prohibiting employment discrimination by the United States Civil Service against World War II veterans with disabilities); Architectural Barriers Act of 1968, 42 U.S.C. 4151 *et seq.*; Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*; Education of the Handicapped Act, Pub. L. No. 91-230, Title VI, 84 Stat. 175 (reenacted in 1990 as the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.*); Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. 6000 *et seq.*; Voting Accessibility for the Elderly and Handicapped Act, 42 U.S.C. 1973ee; Air Carrier Access Act of 1986, 49 U.S.C. 41705; Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 U.S.C. 10801; Fair Housing Amendments of 1988, 42 U.S.C. 3604.

[4] See Rehabilitation Act Amendments of 1984, Pub. L. No. 98-221, Title I, § 141(a), 98 Stat. 26; Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 502(b), 100 Stat. 1807.

sary discrimination." Nat'l Council on the Handicapped, *On the Threshold of Independence* 2 (1988) (*Threshold*). Persons with disabilities reported discrimination in the workplace, "denials of educational opportunities, lack of access to public buildings and public bathrooms, [and] the absence of accessible transportation." *Id.* at 20-21, 41. Extensive surveys also revealed an "alarming rate of poverty,"[5] a dramatic educational gap,[6] a "Great Divide" in employment,[7] and a life of social "isolat[ion]"[8] for persons with disabilities. *Id.* at 14. The reports further found that "[c]omplexities, inconsistencies, and fragmentation in the various Federal laws and programs" had created a confused and ineffective "patchwork quilt of existing policies and programs," Nat'l Council on the Handicapped, *Toward Independence: An Assessment of Federal Laws and Programs Affecting Persons with Disabilities* 7 (1986), and called for national legislation comprehensively prohibiting discrimination on the basis of disability, *id.* at 18-19; *Threshold* 19-21.

Congress itself engaged in extensive study and fact-finding concerning the problem of discrimination against persons with disabilities, holding 13 hearings devoted speci-

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[5] Twenty percent of persons with disabilities had family incomes below the poverty line (more than twice the percentage of the general population), and 15% of persons with disabilities had incomes of $15,000 or less. *Threshold* 13-14.

[6] Forty percent of persons with disabilities did not finish high school (triple the rate for the general population). Only 29% of persons with disabilities had some college education, compared with 48% for the general population. *Threshold* 14.

[7] Two-thirds of all working-age persons with disabilities were unemployed; only one in four worked full-time. *Threshold* 14.

[8] Two-thirds of persons with disabilities had not attended a movie or sporting event in the past year; three-fourths had not seen live theater or music performances; persons with disabilities were three times more likely not to eat in restaurants; and 13% of persons with disabilities never go to grocery stores. *Threshold* 16-17.

fically to the consideration of the Disabilities Act.[9] In addition, a congressionally designated Task Force held 63 public forums across the country, which were attended by more than 7,000 individuals. Task Force on the Rights and Empowerment of Americans with Disabilities, *From ADA to Empowerment* 18 (1990) (Task Force Report). The Task Force also presented to Congress evidence submitted by

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[9] See *Americans with Disabilities Act of 1989: Hearings on H.R. 2273 Before the House Comm. on the Judiciary and the Subcomm. on Civil and Const. Rights*, 101st Cong., 1st Sess. (1989); *Americans with Disabilities Act: Hearing on H.R. 2273 and S. 933 Before the Subcomm. on Transp. and Haz. Materials of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. (1990); *Americans with Disabilities Act: Hearings on H.R. 2273 Before the Subcomm. on Surface Transp. of the House Comm. on Pub. Works and Transp.*, 101st Cong., 1st Sess. (1990); *Americans with Disabilities: Telecomm. Relay Servs., Hearing on Title V of H.R. 2273 Before the Subcomm. on Telecomm. and Fin. of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. (1990); *Americans with Disabilities Act of 1989: Hearing on H.R. 2273 Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 101st Cong., 1st Sess. (1989); *Field Hearing on Americans with Disabilities Act: Hearing Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 101st Cong., 1st Sess. (1989); *Hearing on H.R. 2273, The Americans with Disabilities Act of 1989: Joint Hearing Before the Subcomm. on Employment Opps. and Select Educ. of the House Comm. on Educ. and Labor*, 101st Cong., 1st Sess. (July 18 & Sept. 13, 1989) (two hearings); *Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988: Hearing Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 100th Cong., 2d Sess. (1989); *Americans with Disabilities Act: Hearing Before the House Comm. on Small Bus.*, 101st Cong., 2d Sess. (1990); *Americans with Disabilities Act of 1989: Hearings on S.933 Before the Senate Comm. on Labor and Human Res. and the Subcomm. on the Handicapped*, 101st Cong., 1st Sess. (1989) (*May 1989 Hearings*); *Americans with Disabilities Act of 1988: Joint Hearing on S. 2345 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Res. and the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 100th Cong., 2nd Sess. (1989); see also T. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 393 & nn.1-3 (1991) (*Move to Integration*).

nearly 5,000 individuals documenting the problems with discrimination faced daily by persons with disabilities—often at the hands of state and local governments. See 2 Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., *Legis. Hist. of Pub. L. No. 101-336: The Americans with Disabilities Act*, 100th Cong., 2d Sess. 1040 (Comm. Print 1990) (*Leg. Hist.*); Task Force Report 16. Congress also considered several reports and surveys. See S. Rep. No. 116, 101st Cong., 1st Sess. 6 (1989); H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 28 (1990); Task Force Report 16.[10]

2. Congress amassed voluminous evidence of historic and enduring discrimination by state and local governments against persons with disabilities and deprivation of their fundamental rights

a. *Historic Discrimination*: The "propriety of any § 5 legislation 'must be judged with reference to the historical experience . . . it reflects.'" *Florida Prepaid Postsec. Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 640 (1999). While petitioners and their amici ignore it, Congress and this Court have long acknowledged the Nation's "history of unfair and often grotesque mistreatment" of persons with disabilities. *Cleburne*, 473 U.S. at 454 (Stevens, J., concurring); see *id.* at 461 (Marshall, J., concurring in the judgment in part (hereinafter cited as (Marshall, J.))); see also *Olmstead* v. *L.C.*, 527 U.S. 581, 608 (Kennedy, J., concurring) ("[O]f course, persons with mental disabilities have been subject to historic mistreatment, indifference, and

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[10] These included the two reports of the National Council on the Handicapped; the Civil Rights Commission's *Accommodating the Spectrum of Individual Abilities* (1983) (*Spectrum*); two polls conducted by Louis Harris & Associates: *The ICD Survey Of Disabled Americans: Bringing Disabled Americans into the Mainstream* (1986), and *The ICD Survey II: Employing Disabled Americans* (1987); a report by the Presidential Commission on the Human Immunodeficiency Virus Epidemic (1988); and eleven interim reports submitted by the Task Force.

hostility."); *Alexander* v. *Choate*, 469 U.S. 287, 295 n.12 (1985) ("well-cataloged instances of invidious discrimination against the handicapped do exist").[11]

That "lengthy and tragic history," *Cleburne*, 473 U.S. at 461 (Marshall, J.), of discrimination, segregation, and denial of basic civil and constitutional rights for persons with

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[11] Courts have found unconstitutional treatment of persons with disabilities in a wide variety of contexts, including violations of the Equal Protection Clause, the Due Process Clause, and the Eighth Amendment, as incorporated into Section 1 of the Fourteenth Amendment. See, *e.g.*, *Youngberg* v. *Romeo*, 457 U.S. 307 (1982) (unconstitutional conditions of confinement); *O'Connor* v. *Donaldson*, 422 U.S. 563, 567-575 (1975) (impermissible confinement); *Chalk* v. *United States Dist. Ct. Cent. Dist. of Cal.*, 840 F.2d 701 (9th Cir. 1988) (certified teacher barred from teaching after diagnosis of AIDS); *LaFaut* v. *Smith*, 834 F.2d 389 (4th Cir. 1987) (Powell, J.) (failure to provide paraplegic inmate with an accessible toilet is cruel and unusual punishment); *Pushkin* v. *Regents of the Univ. of Colo.*, 658 F.2d 1372 (10th Cir. 1981) (doctor with multiple sclerosis denied residency out of concern about patients' reactions); *Gurmankin* v. *Costanzo*, 556 F.2d 184 (3d Cir. 1977) (irrebuttable presumption that blind teacher cannot instruct sighted students); *Garrity* v. *Gallen*, 522 F. Supp. 171, 214 (D.N.H. 1981) ("blanket discrimination against the handicapped * * * is unfortunately firmly rooted in the history of our country"); *New York State Ass'n for Retarded Children, Inc.* v. *Carey*, 466 F. Supp. 487 (E.D.N.Y. 1979); *Smith* v. *Fletcher*, 393 F. Supp. 1366, 1368 (S.D. Tex. 1975) (government assigned paraplegic, who had a Master's degree in physiology, to menial clerical tasks based on "arbitrary and unfounded decision as to her physical capabilities"), aff'd as modified, 559 F.2d 1014 (5th Cir. 1977); *Mills* v. *Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Pennsylvania Ass'n for Retarded Children* v. *Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971); *Connecticut Inst. for the Blind* v. *Connecticut Comm'n on Human Rights & Opps.*, 405 A.2d 618, 621 (Conn. 1978) (blanket exclusion from state jobs of persons with visual impairments), modified, 355 N.Y.S.2d 185 (App. Div. 1974); *Bevan* v. *New York State Teachers' Retirement Sys.*, 345 N.Y.S.2d 921 (Sup. Ct. 1973) (statute allowing forced retirement of teacher who became blind); *Spectrum* 62-66, 131-133, 141 (citing additional cases); M. Burgdorf & R. Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 Santa Clara Lawyer 855, 863 (1975) (*Unequal Treatment*) (citing additional cases).

disabilities assumed an especially pernicious form in the early 1900s, when the eugenics movement and Social Darwinism labeled persons with mental and physical disabilities "a menace to society and civilization . . . responsible in a large degree for many, if not all, of our social problems." *Cleburne*, 473 U.S. at 462 (Marshall, J.); see also Civil Rights Comm'n, *Accommodating the Spectrum of Individual Abilities* 19 (1983) (*Spectrum*). Persons with disabilities were portrayed as "sub-human creatures" and "waste products" responsible for poverty and crime. *Spectrum* 20. "A regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow." *Cleburne*, 473 U.S. at 462 (Marshall, J.). Every single State, by law, provided for the segregation of persons with mental disabilities and, frequently, epilepsy, and excluded them from public schools and other state services and privileges of citizenship.[12] States also fueled the fear and isolation of persons with disabilities by requiring public officials and parents, sometimes at risk of criminal prosecution, to report the "feeble-minded" and segregate them into institutions. *Spectrum* 20, 33-34.[13]

With the aim of halting reproduction and "nearly extinguish[ing] their race," *Cleburne*, 473 U.S. at 462 (Marshall, J.), almost every State accompanied forced segregation with compulsory sterilization and prohibitions of marriage, see *id.* at 463. See also *Buck* v. *Bell*, 274 U.S. 200, 207 (1927) (upholding compulsory sterilization law "in order to prevent our being swamped with incompetence"; "It is

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[12] See People First Cert. Amicus Br., *Alsbrook* v. *City of Maumelle*, No. 99-423, App. A (*Compendium of State Laws*); see also *Cleburne*, 473 U.S. at 463 (Marshall, J.) (state laws deemed persons with mental disorders "unfit for citizenship"); Note, *Mental Disability and the Right to Vote*, 88 Yale L.J. 1644 (1979).

[13] See *Compendium of State Laws* A5, A21-A22, A25, A28-A29, A40, A44, A46-A49, A50-A51, A56, A61-A63, A65-A66, A71, A74-A75.

better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. * * * Three generations of imbeciles are enough.").[14]

Children with mental disabilities were labeled "ineducable" and categorically excluded from public schools to "protect nonretarded children from them." *Cleburne*, 473 U.S. at 463 (Marshall, J.); see also *Board of Educ.* v. *Rowley*, 458 U.S. 176, 191 (1982) ("many of these children were excluded completely from any form of public education"). Numerous States also restricted the rights of physically disabled people to enter into contracts, *Spectrum* 40, while a number of large cities enacted "ugly laws," which prohibited the physically disabled from appearing in public:

> No person who is diseased, maimed, mutilated or in any way deformed so as to be an unsightly or disgusting object or improper person to be allowed in or on the public ways or other public places in this city, shall therein or thereon expose himself to public view, under a penalty of not less than one dollar nor more than fifty dollars for each offense.

Unequal Treatment 863 (quoting Chicago ordinance). Such laws were enforced as recently as 1974. *Id.* at 864.[15]

b. ***The Enduring Legacy of Governmental Discrimination*****:** "Prejudice, once let loose, is not easily cabined." *Cleburne*, 473 U.S. at 464 (Marshall, J.). "[O]ut-dated statutes are still on the books, and irrational fears or ignorance, *traceable to the prolonged social and cultural isolation*" of

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[14] See also 3 *Leg. Hist.* 2242 (James Ellis); *Unequal Treatment* 887-888.

[15] See also *State ex rel. Beattie* v. *Board of Educ.*, 172 N.W. 153, 153 (Wis. 1919) (approving exclusion of a boy with cerebral palsy from public school because he "produces a depressing and nauseating effect upon the teachers and school children") (noted at 2 *Leg. Hist.* 2243); see generally *Move to Integration* 399-407.

those with disabilities "continue to stymie recognition of the[ir] dignity and individuality." *Id.* at 467 (emphasis added).[16] Consequently, "our society is still infected by the ancient, now almost subconscious assumption that people with disabilities are less than fully human and therefore are not fully eligible for the opportunities, services, and support systems which are available to other people as a matter of right. The result is massive, society-wide discrimination." S. Rep. No. 116, *supra*, at 8-9.[17]

Moreover, as we detail below (pp. 18-30, *infra*), based on the testimony of hundreds of witnesses before Congress and at the Task Force's forums,[18] Congress found, as a matter of

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[16] For example, as recently as 1983, 15 States continued to have compulsory sterilization laws on the books, four of which included persons with epilepsy. *Spectrum* 37; see also *Stump* v. *Sparkman*, 435 U.S. 349, 351 (1978) (Indiana judge ordered the sterilization of a "somewhat retarded" 15 year old girl). As of 1979, "most States still categorically disqualified 'idiots' from voting, without regard to individual capacity and with discretion to exclude left in the hands of low-level election officials." *Cleburne*, 473 U.S. at 464 (Marshall, J.).

[17] See also 3 *Leg. Hist.* 2020 (Att'y Gen. Thornburgh) ("But persons with disabilities are all too often not allowed to participate because of stereotypical notions held by others in society—notions that have, in large measure, been created by ignorance and maintained by fear."); 2 *Leg. Hist.* 1606 (Arlene Mayerson) ("Most people assume that disabled children are excluded from school or segregated from their non-disabled peers because they cannot learn or because they need special protection. Likewise, the absence of disabled co-workers is simply considered confirmation of the obvious fact that disabled people can't work. These assumptions are deeply rooted in history."); 134 Cong. Rec. E1311 (daily ed. Apr. 28, 1988) (Rep. Owens) ("The invisibility of disabled Americans was simply taken for granted. Disabled people were out of sight and out of mind.").

[18] The Task Force submitted to Congress "several thousand documents" evidencing "massive discrimination and segregation in all aspects of life" and "the most extreme isolation, unemployment, poverty, psychological abuse and physical deprivation experienced by any segment of our society." 2 *Leg. Hist.* 1324-1325. Those documents—mostly handwritten letters and commentary collected during the Task Force's forums—were part of the official legislative history of the Disabilities Act.

present reality and historical fact, that discrimination pervaded state and local governmental operations and that persons with disabilities have been and are subjected to "widespread and persisting deprivation of [their] constitutional rights." *Florida Prepaid*, 527 U.S. at 645; see also 42 U.S.C. 12101(a)(2) and (a)(3). In particular, Congress reasonably discerned a substantial risk that persons with disabilities will be subjected to unconstitutional discrimination by state and local governments in the form of (i) "arbitrary or irrational" distinctions and exclusions, *Cleburne*, 473 U.S. at 446; (ii) governmental decisions grounded in "mere negative attitudes," "vague, undifferentiated fears," *id.* at 448-449, "animosity," *Romer*, 517 U.S. at 634, paternalism, *United States* v. *Virginia*, 518 U.S. 515, 541-544 (1996), and false or overly broad stereotypes about ability, *Olmstead*, 527 U.S. at 611 (Kennedy, J., concurring) ("[T]he line between animus and stereotype is often indistinct."); and (iii) governmental effectuation of private biases, *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984).

In addition, the evidence before Congress established that States and their subdivisions structure governmental programs and operations in a manner that has the effect of denying persons with disabilities the equal opportunity to obtain vital services and to exercise fundamental rights (such as the rights to vote, to petition government officials, to adequate custodial treatment, and to equal access to the courts and public education). Such conduct falls within Congress's enforcement power for two reasons. First, there is a substantial risk that those decisions result from invidious intent and therefore violate the Constitution. Second, those

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See *id.* at 1336, 1389. Because the handwritten submissions were never formally indexed by Congress, we cite to them by State and Bates stamp number. Although the Task Force presented 5,000 such submissions to Congress—approximately 600 of which alleged discrimination by state actors—we are lodging with the Clerk of the Court only those testimonials that we cite; the balance will be provided to the Court upon request.

decisions impermissibly carry forward the effects of prior unconstitutional policies of segregation and isolation. *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (opinion of O'Connor, J.) (Congress's Section 5 power "include[s] the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations").

(i) Employment: Substantial evidence of employment discrimination by state governments and their subdivisions was adduced. One witness "was told by the Essex Junction School System that they were not hiring me because I used a wheelchair. I suspected it in other situations, but in that one, they actually said this was the reason." 2 *Leg. Hist.* 1076 (John Nelson). A woman "'crippled by arthritis' was denied a job, *not* because she could not do the work but because 'college trustees [thought] 'normal students shouldn't see her.'" S. Rep. No. 116, *supra*, at 7; see also *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 282-283 n.9 (1987). Another witness "applied for a job [at a public library] and was told they had already hired someone with a disability and they had met their quota." Wis. 1759.[19]

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[19] See also H. R. Rep. No. 485, *supra*, Pt. 2, at 29 (woman denied teaching credential because of her paralysis); 2 *Leg. Hist.* 1174-1175 (Susan Downie) (state facility asks person with disability during job interview "humiliating, unethical, and illegal questions about my disability * * * [such as] if my mother had taken drugs while she was pregnant with me" and then denied her the job); *id.* at 1169-1170 (Sara Bloor) (epileptic denied teaching position even though seizure free); *id.* at 1611 n.9 (Arlene Mayerson) (teaching license denied "on the grounds that being confined to a wheelchair as a result of polio, she was physically and medically unsuited for teaching"); *id.* at 1005 (Belinda Mason) (woman fired from school cafeteria management position when her son contracted AIDS); *May 1989 Hearings* 404 (Nat'l Orgs. Responding to AIDS) (professor of veterinary medicine at state university in Kansas fired when it was learned that he had AIDS); Task Force Report 21 (employee with mental retardation forced to quit job due to harassment and ridicule by superior in the California Conservation Corps); Kan. 676 (Kansas Department of Trans-

Of particular relevance to the present case, "[t]estimony before the Committee indicated that there still exists widespread irrational prejudice against persons with cancer." S. Rep. No. 116, *supra*, at 39-40; H.R. Rep. No. 485, *supra*, Pt. 2, at 75. Indeed, a study before Congress revealed that "most corporations and governmental agencies in [California] discriminated in hiring against job applicants for an

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portation fired me "for the stated reason that I have epilepsy," even though performance surpassed established expectations); S.D. 1472 ("[A]s a state employee, I daily see covert discrimination in hiring or not hiring people with disabilities."); N.C. 1157, 1159 (department head at University of North Carolina told interviewee "[I]f I knew you were blind I wouldn't have bothered bringing you in for an interview"); Ill. 550 (teacher told "point blank" that she was not hired to work with children because "the way my eyes were [the left eye doesn't always move with the right], that the children would, 'try to imitate me' "); Haw. 478 (school board did not want to interview an individual with a deformed hand to teach language because of feared reactions of parents); Mass. 836 ("For the job of persuading employers to hire disabled people, [state] Voc-Rehab had hired an able-bodied person over a disabled one."); Advisory Comm'n on Intergovernmental Relations, *Disability Rights Mandates* (1989) (survey of state officials on the perceived impediments to employment of persons with disabilities in state governments); Tex. Rehab. Comm'n, *Placement of the Handicapped in State Gov't Serv.* (1972) (*Texas Report*) (documenting reluctance of state employers to hire and promote persons with disabilities); Greenleigh Assoc., *A Study to Develop a Model for Employment Servs. for the Handicapped* 122 (1969) (in one State's civil service system, "[f]or each 'clerk-typist, Grade X,' there is also a 'clerk-typist, Grade X, visually handicapped,' with a lower salary range"); *Civil Rights Restoration Act of 1987: Hearings Before the Sen. Comm. on Labor & Human Res.*, 100th Cong., 1st Sess. 80 (1987) (Ted Kennedy, Jr.) (none of 23 California jurisdictions was willing to hire blind applicants; many excluded applicants with a history of cancer; one county will not hire an applicant for any job if he or she has lost a leg, regardless of the job-relatedness of the impairment; and another jurisdiction prohibits the hiring of an amputee for any job unless he or she makes use of a prosthesis, even though it may not be required for success on the job).

average period of five years after treatment for cancer." 2 *Leg. Hist.* 1619 (Arlene Mayerson).[20]

(ii) Education: "[E]ducation is perhaps the most important function of state and local governments" because "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown* v. *Board of Educ.*, 347 U.S. 483, 493 (1954). Accordingly, where the State undertakes to provide a public education, that right "must be made available to all on equal terms." *Ibid.* But Congress learned that irrational prejudices, fears, ignorance, and animus still operate to deny persons with disabilities an equal opportunity for public education. For example, a quadriplegic woman with cerebral palsy and a high intellect, who scored well in school, was branded "retarded" by educators, denied placement in a regular school setting, and placed with emotionally disturbed children, where she was told she was "not college material." Vt. 1635. Other school districts also simply labeled as mentally retarded a blind child and a child with cerebral palsy. Neb. 1031; Alaska 38 (noting that child with cerebral palsy subsequently obtained a Masters Degree). "When I was 5," another witness testified, "my mother proudly pushed my wheelchair to our local public school, where I was

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[20] See also S. Rep. No. 116, *supra*, at 7 ("Discrimination also includes harms affecting individuals with a history of disability, and those regarded by others as having a disability as well as persons associated with such individuals."); *Arline*, 480 U.S. at 284 & n.13; 2 *Leg. Hist.* 1551 (EEOC Comm'r Evan Kemp) (people who "had cancer 30 years ago * * * are discriminated [against] because of that cancer"); *May 1989 Hearings* 24 ("Cancer survivors are discriminated against by the outside world in both the public and in the private sectors."); *Burris* v. *City of Phoenix*, 875 P.2d 1340, 1343 (Ariz. Ct. App. 1993) (applicant denied firefighter position even though he "was completely cured" of cancer).

promptly refused admission because the principal ruled that I was a fire hazard." S. Rep. No. 116, *supra*, at 7.[21]

State institutions of higher education suffered from the same stereotypes and prejudices. A person with epilepsy was asked to leave a state college because her seizures were "disrupt[ive]" and, officials said, created a risk of liability. 2 *Leg. Hist.* 1162 (Barbara Waters). A doctor with multiple sclerosis was denied admission to a psychiatric residency program because the state admissions committee "feared the negative reactions of patients to his disability." *Id.* at 1617 (Arlene Mayerson). Another witness explained that, "when I was first injured, my college refused to readmit me"

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[21] See also 136 Cong. Rec. H2480 (daily ed. May 17, 1990) (Rep. McDermott) (school board excluded Ryan White, who had AIDS, not because the board "thought Ryan would infect others" but because "some parents were afraid he would"); 2 *Leg. Hist.* 989 (Mary Ella Linden) ("I was considered too crippled to compete by both the school and my parents. In fact, the [segregated] school never even took the time to teach me to write! * * * The effects of the school's failure to teach me are still evident today."); Or. 1375 (child with cerebral palsy was "given cleaning jobs while other[] [non-disabled students] played sports"); *Spectrum* 28, 29 ("a great many handicapped children" are "excluded from the public schools" or denied "recreational, athletic, and extracurricular activities provided for non-handicapped students"); see also *Education for All Handicapped Children, 1973-1974: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor & Pub. Welfare*, 93d Cong., 1st Sess. 384 (1973) (Peter Hickey) (student in Vermont was forced to attend classes with students two years behind him because he could not climb staircase to attend classes with his peers); *id.* at 793 (Christine Griffith) (first-grade student "was spanked every day" because her deafness prevented her from following instructions); *id.* at 400 (Mrs. Richard Walbridge) (student with spina bifida barred from the school library for two years "because her braces and crutches made too much noise"); Calif. Att'y Gen., *Commission on Disability: Final Report* 17 (Dec. 1989) (*Calif. Report*) ("A bright child with cerebral palsy is assigned to a class with mentally retarded and other developmentally disabled children solely because of her physical disability."); *id.* at 81 (in one town, all disabled children are grouped into a single classroom regardless of individual ability).

because "it would be 'disgusting' to my roommates to have to live with a woman with a disability." Wash. 1733.[22]

(iii) Voting and Political Access: Voting is the right that is "preservative of all rights," *Katzenbach* v. *Morgan*, 384 U.S. 641, 652 (1966), and the Equal Protection Clause guarantees "the opportunity for equal participation by all voters" in elections, *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966). But "in the past years people with disabilities have been turned away from the polling places after they have been registered to vote because they did not look competent." 2 *Leg. Hist.* 1220 (Nancy Husted-Jensen). When one witness turned in the registration card of a voter who has cerebral palsy and is blind, the "clerk of the board of canvassers looked aghast * * * and said to me, 'Is that person competent? Look at that signature." The clerk then arbitrarily invented a reason to reject the registration. *Id.* at 1219. Congress was also aware that a deaf voter was told that "you have to be able to use your voice" to vote. *Equal Access to Voting for Elderly and Disabled Persons: Hearings Before the Task Force on Elections of the House Comm. on House Admin.*, 98th Cong., 1st Sess. 94 (1984) (*Equal Access to Voting Hearings*). "How can disabled people have

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[22] See also 2 *Leg. Hist.* 1224 (Denise Karuth) (state university professor asked a blind student enrolled in his music class "'What are you doing in this program if you can't see' "; student was forced to drop class); *id.* at 1225 (state commission refuses to sponsor legally blind student for masters degree in rehabilitation counseling because "the State would not hire blind rehabilitation counselors, '[s]ince,' and this is a quote: 'they could not drive to see their clients' "); Wis. 1757 (a doctoral program would not accept a person with a disability because "it never worked out well"); S.D. 1476 (University of South Dakota dean and his successor were convinced that blind people could not teach in the public schools); *Calif. Report* 138; J. Shapiro, *No Pity* 45 (1994) (Dean of the University of California at Berkeley told a prospective student that "[w]e've tried cripples before and it didn't work").

clout with our elected officials when they are aware that many of us are prevented from voting?" Ark. 155.[23]

The denial of access to political officials and vital governmental services also featured prominently in the testimony. For example, "[t]he courthouse door is still closed to Ameri-

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[23] "A blind woman, a new resident of Alabama, went to vote and was refused instructions on the operation of the voting machine." Ala. 16. Another voter with a disability was "told to go home once when I came to the poll and found the voting machines down a flight of stairs with no paper ballots available"; on another occasion that voter "had to shout my choice of candidates over the noise of a crowd to a precinct judge who pushed the levers of the machine for me, feeling all the while as if I had to offer an explanation for my decisions." *Equal Access to Voting Hearings* 45. The legislative record also documented that many persons with disabilities "cannot exercise one of your most basic rights as an American" because polling places were frequently inaccessible. S. Rep. No. 116, *supra*, at 12. As a consequence, persons with disabilities "were forced to vote by absentee ballot before key debates by the candidates were held." *Ibid.*; see also *May 1989 Hearings* 76 (Ill. Att'y Gen. Hartigan) (similar). And even when persons with disabilities have voted absentee, they have been treated differently from other absentee voters. See 2 *Leg. Hist.* 1745 (Nanette Bowling) ("[S]ome jurisdictions merely encouraged persons with disabilities to vote by absentee ballot * * * [which] deprives the disabled voter of an option available to other absentee voters, the right to change their vote by appearing personally at the polls on election day."); *Equal Access to Voting Hearings* 17 & 461 (criticizing States' imposition of special certification requirements on persons with disabilities for absentee voting); see generally 2 *Leg. Hist.* 1767 (Rick Edwards) ("The Twenty-sixth Amendment to the Constitution gives me the right to vote, yet until last year my polling place was inaccessible."); Wis. 1756 (alleging that 37%-40% of Milwaukee polling places are inaccessible to wheelchair users); Mont. 1024, 1027 (Cascade County's polling place is completely inaccessible); Mich. 922 (alleging that 65% of Detroit voting precincts are inaccessible); N.D. 1185 ("In rural North Dakota many voting sites are inaccessible."); Del. 307, Pa. 1436, Okla. 1280, Colo. 277 (all: polling places inaccessible); FEC, *Polling Place Accessibility in the 1988 General Election* 7 (1989) (21% of polling places inaccessible; 27% were inaccessible in 1986 elections).

cans with disabilities"—literally. 2 *Leg. Hist.* 936 (Sen. Harkin).

> I went to the courtroom one day and * * * I could not get into the building because there were about 500 steps to get in there. Then I called for the security guard to help me, who * * * told me there was an entrance at the back door for the handicapped people. * * * I went to the back door and there were three more stairs for me to get over to be able to ring a bell to announce my arrival so that somebody would come and open the door and maybe let me in. I was not able to do that. * * * This is the court system that is supposed to give me a fair hearing. It took me 2 hours to get in. * * * And when [the judge] finally saw me in the courtroom, he could not look at me because of my wheelchair. * * * The employees of the courtroom came back to me and told me, "You are not the norm. You are not the normal person we see every day.

Id. at 1071 (Emeka Nwojke). Numerous other witnesses explained that access to the courts[24] and other important government buildings and officials[25] depended upon their willingness to crawl or be carried.

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[24] See, *e.g.*, Ala. 15 ("A man, called to testify in court, had to get out of his wheelchair and physically pull himself up three flights of stairs to reach the courtroom."); W. Va. 1745 (witness in court case had to be carried up two flights of stairs because sheriff would not let him use the elevator); Consol. Gov't C.A. Br. at 3, *Lane* v. *Tennessee*, No. 98-6730 (6th Cir.) (Lane arrested for two misdemeanors and ordered to report for hearing at inaccessible courthouse; the first day he crawled up the stairs to the courtroom; the second day he was arrested for failure to appear when he refused to crawl or be carried up the stairs; hearing later held with defendant forced to remain outside while counsel shuttled between him and the courtroom).

[25] See, *e.g.*, H.R. Rep. No. 485, *supra*, Pt. 2, at 40 (town hall and public schools inaccessible); 2 *Leg. Hist.* 1331 (Justin Dart) ("We have clients whose children have been taken away from them and told to get parent

(iv) Public Transportation: Individuals also reported discriminatory treatment on public transportation.

> Some of the drivers are very rude and get mad if I want to take the bus. Can you believe that? I work and part of my taxes pay for public buses and then they get mad just because I am using a wheelchair. * * * Maybe another person using a wheelchair is trying to go to work

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information, but have no place to go because the services are not accessible. What chance do they ever have to get their children back?"); *Spectrum* 39 (76% of state-owned buildings offering services and programs for the general public are inaccessible and unusable for persons with disabilities); *May 1989 Hearings* 488, 491 (Ill. Att'y Gen. Hartigan) ("I have had innumerable complaints regarding lack of access to public services—people unable to meet with their elected representatives because their district office buildings were not accessible or unable to attend public meetings because they are held in an inaccessible building"; "individuals who are deaf or hearing impaired call[] our office for assistance because the arm of government they need to reach is not accessible to them"); *id.* at 76 ("[Y]ou cannot attend town council meetings on the second story of a building that does not have an elevator."); *id.* at 663 (Dr. Mary Lynn Fletcher) (to attend town meetings, "I (or anyone with a severe mobility impairment) must crawl up three flights of circular stairs to the 'Court Room.' In this room all public business is conducted by the county government whether on taxes, zoning, schools or any type of public business."); Alaska 73 ("We have major problems in Seward, regarding accessibility to City and State buildings for the handicapped and disabled."; City Manager responded that "[H]e runs this town * * * and no one is going to tell him what to do."); Ind. 626 ("Raney, who has been in a wheelchair for 12 years, tried three times last year to testify before state legislative committees. And three times, he was thwarted by a narrow set of Statehouse stairs, the only route to the small hearing room."); Ind. 651 (person with disabilities could not attend government meetings or court proceedings because entrances and locations were inaccessible); Wis. 1758 (lack of access to City Hall); Wyo. 1786 (individual unable to get a marriage license because the county courthouse was not wheelchair accessible); *Calif. Report* 70 ("People with disabilities are often unable to gain access to public meetings of governmental and quasi-governmental agencies to exercise their legal right to comment on issues that impact their lives.").

> or school and they should not have to crawl up the stairs and get dirty. * * * It is hard for people to feel good about themselves if they have to crawl up the stairs of a bus, or if the driver passes by without stopping. * * * I learned in school that black people had problems with buses, too.

2 *Leg. Hist.* 993 (Jade Calegory).[26] A "key" Connecticut transportation official responded to requests for accessibility by asking "Why can't all the handicapped people live in one place and work in one place? It would make it easier for us." *Id.* at 1085 (Edith Harris).[27]

(v) Law Enforcement: Persons with disabilities have also been victimized in their dealings with law enforcement. When police in Kentucky learned that a man they arrested had AIDS, "[i]nstead of putting the man in jail, the officers locked him inside his car to spend the night." 2 *Leg. Hist.* 1005 (Belinda Mason). Police refused to accept a rape complaint from a blind woman because she could not make a visual identification, ignoring the possibility of alternative means of identifying the perpetrator. N.M. 1081. A person in a wheelchair was given a ticket and six-months of probation for obstructing traffic on the street, even though the person could not use the sidewalk because it lacked curb cuts. Va. 1684. Task Force Chairman Justin Dart testified, moreover, that persons with hearing impairments "have been arrested and held in jail over night without ever know-

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[26] See also 2 *Leg. Hist.* 1257 (Speed Davis) (similar); Mass. 831 ("Blacks wanted to ride in the front of the bus. Disabled people just want[] on.").

[27] See also 2 *Leg. Hist.* 1097 (Bill Dorfer) ("And many of these buses quite often bypass men and women in wheelchairs or with crutches, walkers, because they do not want to take the time, quite frankly, to stop and to assist these people on the buses"); *id.* at 1190 (Cindy Miller) ("It is a 20-minute bus ride [to work], but I have to leave an hour and a half early because the bus lifts are not maintained. * * * But sometimes, like this morning, the bus with the lift just does not stop for me."); Wash. 1716 (person with service dog not allowed to board bus).

ing their rights nor what they are being held for." 2 *Leg. Hist.* 1331.[28] The discrimination continues in correctional institutions. "I have witnessed their jailers rational[ize] taking away their wheelchairs as a form of punishment as if that is different than punishing prisoners by breaking their legs." 2 *Leg. Hist.* 1190 (Cindy Miller).[29]

(vi) Institutionalization: Unconstitutional denials of appropriate treatment and unreasonable institutionalization of persons in state mental hospitals were also catalogued. See 2 *Leg. Hist.* 1203 (Lelia Batten) (state law ineffective; state hospitals are "notorious for using medication for controlling the behavior of clients and not for treatment alone. Seclusion rooms and restraints are used to punish clients."); *id.* at

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[28] See also 2 *Leg. Hist.* 1115 (Paul Zapun) (sheriff threatens persons with disabilities who stop in town due to car trouble); *id.* at 1196 (Cindy Miller) (police "do not provide crime prevention, apprehension or prosecution because they see it as fate that Americans with disabilities will be victims"); *id.* at 1197 (police officer taunted witness by putting a gun to her head and pulling the trigger on an empty barrel, "because he thought it would be 'funny' since I have quadraparesis and couldn't flee or fight"); Tex. 1541 (police refused to take an assault complaint from a person with a disability); *Calif. Report* 101-104 (additional examples). In addition, persons with disabilities, such as epilepsy, are "frequently inappropriately arrested and jailed" and "deprived of medications while in jail." H.R. Rep. No. 485, *supra*, Pt. 3, at 50; see also 136 Cong. Rec. H2633 (daily ed. May 22, 1990) (Rep. Levine); Wyo. 1777; Idaho 517.

[29] See also *Spectrum* 168 (noting discrimination in treatment and rehabilitation programs available to inmates with disabilities and inaccessible jail cells and toilet facilities); *Parrish* v. *Johnson*, 800 F.2d 600, 603, 605 (6th Cir. 1986) (prison guard repeatedly assaulted paraplegic inmates with knife, forced them to sit in own feces, and taunted them with remarks like "crippled bastard" and "[you] should be dead"); *Harrelson* v. *Elmore County*, 859 F. Supp. 1465, 1466 (M.D. Ala. 1994) (paraplegic prisoner denied use of a wheelchair and forced to crawl around his cell); *Calif. Report* 103 ("[A] parole agent sent a man who uses a wheelchair back to prison since he did not show up for his appointments even though he explained that he could not make the appointments because he was unable to get accessible transportation.").

1262-1263 (Eleanor C. Blake) (detailing the "minimal, custodial, neglectful, abusive" care received at state mental hospital, and willful indifference resulting in rape); *Spectrum* 34-35.[30]

(vii) Other Public Services: The scope of the testimony offered to Congress regarding unconstitutional treatment swept so broadly, touching virtually every aspect of individuals' encounters with their government, as to defy iso-

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[30] See also *Calif. Report* 114. Congress also brought to bear the knowledge it had acquired of this problem in enacting the Civil Rights of Institutionalized Persons Act of 1980, Pub. L. No. 96-247, 94 Stat. 349, codified at 42 U.S.C. 1997 *et seq.*, and the Developmental Disabilities Act of 1984, 42 U.S.C. 6000 *et seq.* See, *e.g.*, 132 Cong. Rec. S5914-01 (daily ed. May 14, 1986) (Sen. Kerry) (findings of investigation of state-run mental health facilities "were appalling. The extent of neglect and abuse uncovered in their facilities was beyond belief."); *Civil Rights of Instit. Persons: Hearings on S. 1393 Before the Subcomm. on the Const. of the Sen. Comm. on the Judiciary*, 95th Cong., 1st Sess. 127 (1977) (Michael D. McGuire, M.D.) ("it became quite clear * * * that the personnel regarded patients as animals, * * * and that group kicking and beatings were part of the program"); *id.* at 191-192 (Dr. Philip Roos) (characterizing institutions for persons with mental retardation throughout the nation as "dehumanizing," "unsanitary and hazardous conditions," "replete with conditions which foster regression and deterioration," "characterized by self-containment and isolation, confinement, separation from the mainstream of society"); *Civil Rights for Instit. Persons: Hearings on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 239 (1977) (Stanley C. Van Ness) (describing "pattern and practice of physical assaults and mental abuse of patients, and of unhealthy, unsanitary, and anti-therapeutic living conditions" in New Jersey state institutions); *Civil Rights of Instit. Persons: Hearings on H.R. 10 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 34 (1979) (Paul Friedman) ("[A] number of the residents were literally kept in cages. A number of those residents who had been able to walk and who were continent when they were committed had lost the ability to walk, had become incontinent, and had regressed because of these shockingly inhumane conditions of confinement.").

lating the problem into select categories of state action. Services and programs as varied as zoning[31]; the operation of zoos,[32] public libraries,[33] public swimming pools and park programs[34]; and child custody proceedings[35] exposed the dis-

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[31] Congress knew that *Cleburne* was not an isolated incident. See 2 *Leg. Hist.* 1230 (Larry Urban); see also People First Cert. Amicus Br., *supra*, at 20 n.94; Wyo. 1781 (zoning board declined to authorize group home because of "local residents' unfounded fears that the residents would be a danger to the children in a nearby school"); Nev. 1050 (Las Vegas has passed an ordinance that disallows the mentally ill from living in residential areas); N.J. 1068 (group home for those with head injuries barred because public perceived such persons as "totally incompetent, sexual deviants, and that they needed 'room to roam' "; "Officially, the application was turned down due to lack of parking spaces, even though it was early established that the residents would not have automobiles.").

[32] A zoo keeper refused to admit children with Down Syndrome "because he feared they would upset the chimpanzees." S. Rep. No. 116, *supra*, at 7; H. R. Rep. No. 485, *supra*, Pt. 2, at 30.

[33] See 2 *Leg. Hist.* 1100 (Shelley Teed-Wargo) (town library refused to let person with mental retardation check out a video "because he lives in a group home," unless he was accompanied by a staff person or had a written permission slip); Pa. 1391 (public library will not issue library cards to residents of group homes without the countersignature of a staff member—this rule applies to "those having physical as well as mental disabilities").

[34] A paraplegic Vietnam veteran was forbidden to use a public pool in New York; the park commissioner explained that "[i]t's not my fault you went to Vietnam and got crippled." 3 *Leg. Hist.* 1872 (Peter Addesso); see also *id.* at 1995 (Rev. Scott Allen) (woman with AIDS and her children denied entry to a public swimming pool); *May 1989 Hearings* 76 (Ill. Att'y Gen. Hartigan) (visually impaired children with guide dogs "cannot participate in park district programs when the park has a 'no dogs' rule").

[35] See H.R. Rep. No. 485, *supra*, Pt. 3, at 25 ("These discriminatory polices and practices affect people with disabilities in every aspect of their lives * * * [including] securing custody of their children."); *id.*, Pt. 2, at 41 ("[B]eing paralyzed has meant far more than being unable to walk—it has meant being excluded from public schools * * * and being deemed an 'unfit parent'" in custody proceedings.); 2 *Leg. Hist.* 1611 n.10 (Arlene Mayerson) ("Historically, child-custody suits almost always have ended

criminatory attitudes of officials.[36]

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with custody being awarded to the non-disabled parent."); Mass. 829 (government refuses to authorize couple's adoption solely because woman had muscular dystrophy); *Spectrum* 40; *No Pity, supra*, at 26 (woman with cerebral palsy denied custody of her two sons; children placed in foster care instead); *Carney* v. *Carney*, 598 P.2d 36, 42 (Cal. 1979) (lower court "stereotype[d] William as a person deemed forever unable to be a good parent simply because he is physically handicapped").

[36] See also H.R. Rep. No. 485, *supra*, Pt. 2, at 46 ("How many well educated and highly capable people with disabilities must sit down at home every day, not because of their lack of ability, but because of the attitudes of employers, service providers, and government officials?"); 2 *Leg. Hist.* 1061 (Eric Griffin) ("I come to you as one of those * * * who was denied a public education until age 18, one who has been put through the back door, and kept out of the front door and segregated even if you could get in."); *id.* at 1078 (Ellen Telker) ("State and local municipalities do not make many materials available to a person who is unable to read print."); *id.* at 1116 (Virginia Domini) (persons with disabilities "must fight to function in a society where busdrivers start moving before I have my balance or State human resources [sic] yell 'I can't understand you,' to justify leaving a man without food or access to food over the weekend."); *id.* at 1017 (Judith Heumann) ("Some of these people are in very high places. In fact, one of our categories of great opposition is local administrators, local elected officials."); 3 *Leg. Hist.* 2241 (James Ellis) ("Because of their disability, people with mental retardation have been denied the right to marry, the right to have children, the right to vote, the right to attend public school, and the right to live in their own community, with their own families and friends."); 2 *Leg. Hist.* 1768 (Rick Edwards) ("Why are the new drinking fountains in our State House erected out of reach of persons in wheelchairs? And why were curb cuts at the Indianapolis Airport filled in with concrete?); Task Force Report 21 (six wheelchair users *arrested* for failing to leave restaurant after manager complained that "they took up too much space"); see generally *Spectrum* App. A (identifying 20 broad categories of state-provided or supported services and programs in which discrimination against persons with disabilities arises); *Unequal Treatment, supra.*

3. The existence of state laws against disability discrimination does not negate Congress's finding of widespread discrimination by state governments and their subdivisions

Entirely ignoring the real-life experiences with disability discrimination that hundreds of witnesses related at the congressional hearings and Task Force forums, petitioners tell this Court that the only "real evidence" (Pet. Br. 38) of state action it should consider is the fact that States have enacted laws against disability discrimination, and that Congress was aware of that. Petitioners' argument is entirely mistaken.

First, substantial information and testimony before Congress demonstrated that state laws were "inadequate to address the pervasive problems of discrimination that people with disabilities are facing." S. Rep. No. 116, *supra*, at 18; see also *ibid.* (section of report entitled "CURRENT FEDERAL AND STATE LAWS ARE INADEQUATE"); H.R. Rep. No. 485, *supra*, Pt. 2, at 47 (same). The 50 State Governors' Committees "report[ed] that existing state laws do not adequately counter * * * discrimination." *Ibid.*[37] The Illinois Attorney General testified that "[p]eople with disabilities should not have to win these rights on a State-by-State basis" and that "[i]t is long past time * * * [for] a national policy that puts persons with disabilities on equal footing with other Americans." *May 1989 Hearings* 77. And, although Ohio now tells this Court that application of the Disabilities Act to the States is unnecessary, that is not what Ohio's Governor told Congress at the time. *May 1989*

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[37] See also 136 Cong. Rec. H2627 (May 22, 1990) (Rep. Wolpe), *id.* at H2633 (Rep. Levine); 134 Cong. Rec. S5116 (Apr. 28, 1988) (Sen. Simon); 2 *Leg. Hist.* 963 (Sandra Parrino); *id.* at 967 (Adm. James Watkins) ("Too many States, for whatever reason, still perpetuate confusion. It is time for Federal action."); *id.* at 1642-1643 (Arlene Mayerson) (noting variations and gaps in coverage of state statutes); 3 *Leg. Hist.* 2245 (Robert Burgdorf).

Hearings 778 ("[S]tate and local governments must also be held to the same standards" of ensuring "that there is no discrimination against people with disabilities in any program under their jurisdiction.").[38]

Second, petitioners' appendix of state laws (Br. App. A) neither establishes the effectiveness of those laws nor disproves the existence of official discrimination. As an initial matter, petitioners grossly exaggerate the coverage of those laws. See generally Nat'l Ass'n of Protection & Advocacy Servs. Amicus Br.; J. Flaccus, *Handicap Discrimination Legislation: With Such Inadequate Coverage at the Federal Level, Can State Legislation Be of Any Help?*, 40 Ark. L.

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[38] Other state officials echoed those sentiments. See Dep't of Health & Human Servs., *Visions of: Independence, Productivity, Integration for People with Developmental Disabilities* 29 (1990) (19 States strongly recommended passage of the Disabilities Act); 2 *Leg. Hist.* 1050 (Elmer Bartels, Mass. Rehab. Comm'n); *id.* at 1455-1456 (Nikki Van Hightower, Treas., Harris Co., Tex.); *id.* at 1473-1474 (Robert Lanier, Chair, Metro. Transit Auth. of Harris Co., Tex.); *id.* at 1506 (Texas State Sen. Chet Brooks) ("We cannot effectively piece these protections together state by state, person by person."); *id.* at 1508.

Congress likewise recognized that the prior piecemeal approach of federal legislation had not succeeded and, in fact, had created "a patchwork quilt in need of repair * * * [with] holes in the fabric, serious gaps in coverage that leave persons with disabilities without adequate civil rights protections." S. Rep. No. 116, *supra*, at 19 (quoting Att'y Gen. Thornburgh). Similarly, the Illinois Attorney General testified that the Rehabilitation Act's scheme of prohibiting discrimination by entities receiving federal funds "[u]nfortunately * * * translates [into] total confusion for the disabled community and the inability to expect consistent treatment." *May 1989 Hearings* 77-78; see also 26 Weekly Comp. Pres. Doc. 1165 (July 26, 1990) (President Bush's signing statement observes that "[e]xisting laws and regulations * * * have left broad areas of American life untouched or inadequately addressed"); H.R. Rep. No. 485, *supra*, Pt. 4, at 24; 134 Cong. Rec. S5116 (daily ed. Apr. 28, 1988) (Sen. Simon); *id.* at S5107 (Sen. Weicker); 2 *Leg. Hist.* 1272 (Rep. Owens); 3 *Leg. Hist.* 2015 (Att'y Gen. Thornburgh); *id.* at 2244-2245 (Robert Burgdorf).

Rev. 261 (1986) (detailing gaps in coverage of state laws). Prior to 1990, nearly half of the States did not protect persons with mental illness and/or mental disabilities. See Flaccus, *supra*, at 278-280. New Hampshire excluded disabilities caused by illness, N.H. Rev. Stat. Ann. § 354-A:3(XIII) (1984), while Arizona excluded disabilities which were first manifested after the age of 18, Ariz. Rev. Stat. § 36-551(11)(b) (1986). Flaccus, *supra*, at 285. Of particular relevance here, few States protected against discrimination based on either a perceived disability or a history of illness such as cancer. See B. Hoffman, *Employment Discrimination Based on Cancer History*, 1986 Temple L.Q. 1 (1986). Many States failed to provide for private rights of action and compensatory damages, effectively leaving victims of discrimination without enforceable remedies. *Id.* at App. B; Flaccus, *supra*, at 300-310, 317-321.

Furthermore, petitioners' surmise about the effectiveness of those laws cannot supplant the first-hand testimony of witness after witness about the instances of discrimination they faced and the ineffectiveness of state laws. Just as state laws against race discrimination have neither eradicated the problem nor undermined the basis for subjecting state employers to federal prohibitions,[39] Congress was equally justified in concluding that state laws against disability discrimination had generally been ineffective in combating the lingering effects of prior official discrimination and exclusionary laws and policies. Indeed, while the Disabilities Act was before Congress, the Advisory Commission on Intergovernmental Relations (ACIR)[40] surveyed state compliance with prohibitions on employment

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[39] See, *e.g.*, S. Rep. No. 415, 92d Cong., 1st Sess. 19 (1971) (37 States had equal employment laws at the time Title VII was extended to the States).

[40] The Commission's membership included six Members of Congress and 11 representatives from state and local governments.

discrimination and reported that 35% of responding state and local governments had *no* employees with disabilities, and half had only "one or two." ACIR, *Disability Rights Mandates* 64 (1989). Further, 82% of state and local government employers harbored moderate to strong negative attitudes and misconceptions about hiring persons with disabilities, based on stereotypes, prejudice, and "feelings of discomfort in associating with disabled individuals." *Id.* at 72-73. That, unfortunately, "is the pervasive backdrop against which regulatory mandates are carried out." *Id.* at 96.[41]

Third, petitioners fail in their effort to show that Congress considered state disability discrimination laws to be effective. While petitioners correctly note (Br. 32) that the Senate Report stated that "[v]irtually all States prohibit unfair discrimination among persons of the same class and equal expectation of life," that statement referred not to state anti-discrimination laws, but rather to state regulation of unfair insurance practices. See S. Rep. No. 116, *supra*, at 84. Similarly, while it is true that Attorney General Thornburgh noted that federal action should take account of existing state laws (Pet. Br. 32), that statement referred to state laws prohibiting only private-sector discrimination. Likewise, the National Coalition of Cancer Survivorship did note that every State had laws regulating disability dis-

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[41] See also Ala. 17 (every day at her job, the Director of Alabama's Disabled Persons Protection Commission "ha[d] to drive home to use the bathroom or call my husband to drive in and help me because the newly renovated State House" lacked accessible bathrooms); *Calif. Report* 22-23 (noting "gaps" and "contradictions" in state law); *Texas Report* 9 (noting that commitment of high-level policymakers to non-discrimination not alone sufficient because "it comes down to the choice made by an immediate supervisor * * * [and] [i]f this person does not share the philosophy that hiring the handicapped is good business it is all over for that person. Then what we are doing actually is, we are giving lip service to it but it is not going to happen.").

crimination (Pet. Br. 33), but went on to explain that "[t]he scope of these [state] laws, however, varies widely," and provided a lengthy and detailed critique (complete with chart) of the limitations of state laws such as Alabama's. *May 1989 Hearings* 386-394. Indeed, as noted earlier, many witnesses testified, without contradiction, that "state laws have not provided substantial protection to people with disabilities." 3 *Leg. Hist.* 2245 (James Ellis) (cited at Pet. Br. 34, 37).[42]

4. Disability discrimination does not fall beyond Congress's Section 5 enforcement power simply because it is subject to rational-basis review by courts

Petitioners contend (Br. 44-48) that, notwithstanding the voluminous evidence of discrimination before it, Congress's hands are tied because disability discrimination is subject to rational-basis review by the courts. In petitioners' view, Section 5 permits Congress only to prohibit disability discrimination that would be declared unconstitutional by a court,

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[42] Petitioners' repeated reliance (Br. 4, 33) on Rep. Moakley's comment that state laws are "out in front" of federal law ignores that Rep. Moakley had earlier decried the weaknesses of state laws. *Employment Discrim. Against Cancer Victims and the Handicapped: Hearing Before the Subcomm. on Employment Opp. of the House Comm. on Educ. & Labor*, 99th Cong., 1st Sess. 62 (1985) (Rep. Moakley) ("[O]ne-fourth of the states have no protection for the handicapped. Additionally, even those states with laws differ greatly in their regulations.") (attaching ten-state survey showing gaps in coverage of laws like Alabama's). Placed in context, then, the quotation petitioners rely so heavily upon is more fairly read as a complaint about the deficiencies and gaps in federal law, rather than an assertion of the sufficiency of state law. Compare also Pet. Br. 31 (quoting Barbara Hoffman), with *Discrimination Against Cancer Victims and the Handicapped: Hearing Before the Subcomm. on Employment Opportunities of the House Comm. on Educ. & Labor*, 100th Cong., 1st Sess. 86 (1987) (Barbara Hoffman) ("most [state] laws do not clearly protect cancer survivors" from discrimination; for those few that do, the "State agency which enforces that law still will not strike down the civil service regulations which blatantly are violative of the act").

and not to identify or prevent Fourteenth Amendment violations that might elude judicial review, because "the use of prophylactic authority under Section 5 in the context of rights that warrant rational-basis review" (Pet. Br. 44-45) is impermissible. Of course, to the extent that the Disabilities Act enforces the Due Process Clause of the Fourteenth Amendment by remedying and preventing governmental conduct that burdens the fundamental rights of persons with disabilities—such as the right to vote, to access the courts, to petition officials for the redress of grievances, to be accorded due process by law enforcement officials, and to humane conditions of confinement—petitioners' argument is misplaced. See, *e.g.*, *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988) ("the most exacting scrutiny" applies to infringements of fundamental rights). And even where rational-basis review applies, petitioners' theory finds no basis in the Constitution's text, this Court's precedents, or logic.

First, petitioners' proposed restriction appears nowhere in the text of Section 5, which gives Congress the power to enforce the entire Fourteenth Amendment. See *Flores*, 521 U.S. at 519. Nor could it be grounded in the history of Section 5, because the tiers of judicial scrutiny were unknown to the Framers of the Fourteenth Amendment and, in fact, did not appear until a century later.

Second, petitioners' attempt to exclude select categories of discrimination from Congress's enforcement power cannot be reconciled with this Court's precedents. In *Cleburne*, this Court held that disability discrimination should receive rational-basis review by the courts, not because persons with disabilities lack the traditional indicia of a suspect class—they in fact possess many of those criteria—but because heightened scrutiny would unduly limit legislative solutions. "How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals." 473 U.S. at 442-443. While the Court in *Cleburne* acknowledged

the important role of state legislators in that process, *id.* at 442, it also recognized the appropriateness of congressional legislation, see *id.* at 439 (rational-basis scrutiny applies only "absent controlling congressional direction"); *id.* at 443-444. Thus, the judiciary's application of rational-basis scrutiny is premised upon the enhanced—not diminished—capacity of Congress to address the problem.[43]

Indeed, if petitioners were correct, this Court likely would have mentioned that categorical limitation in either *Kimel*, *supra*, or *Oregon* v. *Mitchell*, 400 U.S. 112 (1970). In each of those cases, the Court invalidated Section 5 legislation concerning age discrimination—subject only to rational-basis review—without hinting at, let alone endorsing, petitioners' constitutional fault line. Moreover, petitioners' theory is directly contradicted by this Court's ruling in *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), sustaining under Section 5 the extension of Title VII's ban on gender discrimination to the States at a time when a majority of the Court had not yet concluded that gender discrimination warrants heightened scrutiny.[44] In fact, any classification that is subject to judicial review for arbitrariness under the Equal Protection Clause must also be subject to congressional legislation under Section 5, because "[i]t is not * * * the *judicial*

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[43] The Disabilities Act does not affect or impair the ability of the States to "provide[] greater or equal protection for the rights of individuals with disabilities." 42 U.S.C. 12201(b).

[44] Not until the Term after *Fitzpatrick* did the Court hold that gender discrimination warrants heightened scrutiny. *Craig* v. *Boren*, 429 U.S. 190, 197-199 (1976). A year *after* the 1972 amendments, a plurality of this Court had expressed its view that gender distinctions merit enhanced scrutiny, *Frontiero* v. *Richardson*, 411 U.S. 677, 682-688 (1973) (opinion of Brennan, J.), but the constitutionality of Title VII's abrogation did not turn upon that fact. *Fitzpatrick* did not cite *Frontiero* or discuss the applicable equal protection standard. See also *Maher* v. *Gagne*, 448 U.S. 122, 132 (1980) (Section 5 power validly abrogated Eleventh Amendment immunity for attorney's fees even where constitutional claims at issue were subject to rational-basis review).

power" but "the power of Congress which has been enlarged" by Section 5. *Ex parte Virginia*, 100 U.S. at 345.[45]

Third, the reasons for restricting courts to rational-basis review do not disqualify Congress from providing appropriate enforcement measures. Rational-basis scrutiny "is a paradigm of *judicial* restraint," *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) (emphasis added), designed to cabin the exercise of judicial power to invalidate duly-enacted state and federal legislation. It reflects the notion that stringent judicial review should largely be reserved for the protection of those groups with limited access to the political process.[46] Thus, generally when courts entertain equal protection challenges, they must be exceedingly deferential to the underlying legislative judgments and factfinding, requiring those challenging the laws to show that "the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance* v. *Bradley*, 440 U.S. 93, 111 (1979); see also *Heller* v. *Doe*, 509 U.S. 312, 320-321 (1993).

By contrast, because congressional enforcement does not share either the anti-democratic character of judicial review or the limited capacity of courts to collect and review relevant information, Congress has "wide latitude" and a markedly different role from the courts when performing its

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[45] Petitioners' concern that sustaining the Disabilities Act as an exercise of the Section 5 power will open the floodgates to federal legislation is misplaced. This Court has devised a test for evaluating the propriety of Section 5 legislation that has proven perfectly capable of policing congressional overreaching. See *United States* v. *Morrison*, 120 S. Ct. 1740 (2000); *Kimel*, *supra*; *Flores*, *supra*.

[46] See *Cleburne*, 473 U.S. at 441 ("courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices"); see also *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

"duty to make its own informed judgment on the meaning and force of the Constitution," *Flores*, 521 U.S. at 520, 535.

> The creation of national rules for the governance of our society simply does not entail the same concept of recordmaking that is appropriate to a judicial or administrative proceeding. Congress has no responsibility to confine its vision to the facts and evidence adduced by particular parties. Instead, its special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue.

Fullilove, 448 U.S. at 502-503 (Powell, J., concurring).[47]

Accordingly, Congress's enforcement power under Section 5 extends to the full spectrum of conduct that violates the Equal Protection Clause, and not merely to the class of governmental actions that this Court stands ready to invalidate under heightened scrutiny.[48] Rather, by drawing on a

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[47] See also *Heller*, 509 U.S. at 320 ("[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data."); *Bush* v. *Lucas*, 462 U.S. 367, 389 (1983) (Congress "may inform itself through factfinding procedures such as hearings that are not available to the courts."); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 330 (1966) ("In identifying past evils, Congress obviously may avail itself of information from any probative source.").

[48] To hold otherwise would "depreciate both congressional resourcefulness and congressional responsibility for implementing the [Fourteenth] Amendment" and would, contrary to this Court's rulings, consign Congress "to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the 'majestic generalities' of § 1 of the Amendment." *Morgan*, 384 U.S. at 648-649; see also *Croson*, 488 U.S. at 519 (Kennedy, J., concurring in part & concurring in the judgment) ("[I]t diminishes the constitutional responsibilities of the political branches to say they must wait to act until ordered to do so by a court."); *Oregon*, 400 U.S. at 296 (opinion of Stewart, J.) (Congress can find invidious discrimination in state action "even though a court in an individual lawsuit might not have reached that factual conclusion").

broad base of knowledge and experience, Congress is able to apply this Court's definition of equal protection to a set of legislatively determined facts and ascertain, in a way that courts cannot, whether and how often governmental action entails the "indiscriminate imposition of inequalities," *Romer*, 517 U.S. at 633, or is the likely outgrowth of prior governmental discrimination and exclusion, and the "negative attitudes" and "vague, undifferentiated fears," *Cleburne*, 473 U.S. at 448-449, that official segregation spawned.

B. The Americans With Disabilities Act Is Reasonably Tailored To Remedying And Preventing Unconstitutional Discrimination Against Persons With Disabilities

When enacting Section 5 legislation, Congress "must tailor its legislative scheme to remedying or preventing" the unconstitutional conduct it has identified. *Florida Prepaid*, 527 U.S. at 639. Congress, however, may "paint with a much broader brush than may this Court, which must confine itself to the judicial function of deciding individual cases and controversies upon individual records." *Fullilove*, 448 U.S. at 501-502 n.3. Accordingly, "Congress' § 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment." *Kimel*, 120 S. Ct. at 644. Rather, "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *Lopez* v. *Monterey County*, 525 U.S. 266, 282 (1999); see also *United States* v. *Morrison*, 120 S. Ct. 1740, 1755 (2000). The operative question thus is not whether the Disabilities Act "prohibit[s] a somewhat broader swath of conduct," *Kimel*, 120 S. Ct. at 644, than would the courts, but whether the Disabilities Act sweeps more broadly than Congress could reasonably have deemed necessary to combat the historic

and enduring legacy of discrimination, segregation, and isolation faced by persons with disabilities. It does not.

1. Discrimination on the basis of disability violates the Constitution more frequently than most classifications subject only to rational-basis review

Petitioners assert (Br. 40-44) that the Disabilities Act is not proper enforcement legislation because, like the age discrimination statute at issue in *Kimel*, it prohibits significant amounts of conduct that the Constitution does not. They are mistaken, because the gap between what the Constitution and this legislation proscribes is far narrower than it was in *Kimel*. While both age and disability discrimination are subject to rational-basis judicial review, courts have far more readily found a rational basis for age discrimination, see *Kimel*, 120 S. Ct. at 646-647, than for disability discrimination, see Section A.2, *supra*. The reason for that difference is, as *Cleburne* and *Romer* demonstrate, that the determination whether governmental conduct lacks a rational basis for purposes of the Equal Protection Clause is a contextual one, sensitive to the historical and social environment in which governmental decisionmaking arises. *Heller*, 509 U.S. at 321 (basis for governmental action "must find some footing in the realities of the subject addressed by the legislation"); see also *Plyler* v. *Doe*, 457 U.S. 202, 223 (1982). Because persons with disabilities, unlike older persons (*Kimel*, *supra*) or opticians (*Williamson* v. *Lee Optical*, 348 U.S. 483 (1955)), have been "subjected to a 'history of purposeful unequal treatment,'" *Kimel*, 120 S. Ct. at 645, disability discrimination is more likely in fact to result from false stereotypes and unconstitutional animus.[49] "Because

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[49] For example, while government generally may use age as a proxy for employment decisionmaking regardless of the nexus to actual ability, *Kimel*, 120 S. Ct. at 646, a governmental policy of refusing to hire all persons with disabilities or requiring the retirement of all wheelchair

prejudice spawns prejudice, and stereotypes produce limitations that confirm the stereotype on which they are based, a history of unequal treatment requires sensitivity to the prospect that its vestiges endure." *Cleburne*, 473 U.S. at 473 n.24 (Marshall, J.).

2. The Disabilities Act reaches no further than Congress reasonably deemed necessary to remedy and prevent unconstitutional discrimination

The Disabilities Act targets discrimination that is unreasonable. The States retain their discretion to exclude persons from employment programs, services, or benefits for any lawful reason unconnected with their disability or for no reason at all.[50] The Disabilities Act also permits discrimination if a person cannot "perform the essential functions of the employment position," 42 U.S.C. 12111(8), or "meet[] the essential eligibility requirements" of the governmental program or service, 42 U.S.C. 12131(2). But once an individual proves that she can perform all but the non-essential tasks of a job or can meet all but the non-essential eligibility requirements of a program or service, the government's interest in excluding that individual solely "by reason of such disability," 42 U.S.C. 12132, is both minimal and, in light of history, constitutionally circumscribed. At the same time, permitting the States to retain and enforce their essential eligibility requirements protects their legitimate interests in selecting and structuring governmental activities.[51] The

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users even where the disability bears no relation to job functions, would likely meet a different constitutional fate.

[50] The types of disabilities covered by the Act, moreover, are generally confined to those substantially limiting conditions that have given rise to discriminatory treatment in the past. See *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471 (1999); *Murphy* v. *United Parcel Serv.*, 527 U.S. 516 (1999); *Albertsons, Inc.* v. *Kirkingburg*, 527 U.S. 555 (1999).

[51] Cf. *Southeastern Community College* v. *Davis*, 442 U.S. 397, 406-407, 409-410 (1979) (under Section 504 of the Rehabilitation Act, State

Disabilities Act thus carefully balances a State's legitimate operational interests against the right of a person with a disability to be judged "by his or her own merit and essential qualities." *Rice* v. *Cayetano*, 120 S. Ct. 1044, 1057 (2000).[52]

The statute thus requires more than the Constitution only to the extent that some disability discrimination may be rational for constitutional purposes, but unreasonable under the standards of the Disabilities Act. That margin of statutory protection does not redefine the constitutional right at issue (see Pet. Br. 39). Instead, like Title VII on which the Disabilities Act was modeled, the enhanced statutory protection is necessary to enforce this Court's constitutional standard by reaching unconstitutional conduct that would otherwise escape detection in court, remedying the continuing effects of prior unconstitutional discrimination, and deterring future constitutional violations. "While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern," *Flores*, 521 U.S. at 519, the Disabilities Act is on the remedial and prophylactic side of that line.

a. ***Disparate Impact***: Petitioners thrice object (Pet. Br. 42-43 ¶¶ 4, 7, 9) that the Disabilities Act prohibits practices that have an unjustified disparate impact on persons with disabilities. However, prohibiting or requiring modifications of rules, policies, and practices that have a discriminatory impact is a traditional and appropriate exercise of the Section 5 power to combat a history of invidious discrimination.[53] By proscribing governmental practices with a dis-

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need not abandon essential requirements of its nursing program or fundamentally alter the nature of the program).

[52] See also *Plyler*, 457 U.S. at 221-222 ("[O]ne of the goals of the Equal Protection Clause [is] the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit.").

[53] See *Fullilove*, 448 U.S. at 477 (opinion of Burger, C.J.) ("[C]ongressional authority [under Section 5] extends beyond the prohibition of

criminatory impact, 42 U.S.C. 12112(b)(6), the Disabilities Act eliminates "built-in headwinds" for persons with disabilities, *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971), and fleshes out "subconscious stereotypes and prejudices," *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988). At the same time, the Act protects the States' use of rules and practices that are necessary and reasonably related to the job or program, 42 U.S.C. 12112(b)(6).

b. ***Reasonable Accommodation***: As petitioners note (Br. 43 ¶¶ 5, 6), the Disabilities Act requires "reasonable accommodation" in employment, 42 U.S.C. 12111(8), 12111(b)(5)(A), and "reasonable modifications" in public services, 42 U.S.C. 12131(2). Those requirements, however, are precisely tailored to the unique features of disability discrimination in two ways.

First, given the history of segregation and isolation and the resulting entrenched stereotypes, fear, prejudices, and ignorance about persons with disabilities, Congress reasonably determined that a simple ban on future discrimination would be insufficient to purge the stain of past discrimination. Therefore, the Disabilities Act affirmatively promotes the integration of individuals with disabilities—both in order to remedy past unconstitutional conduct and to prevent future discrimination. Congress could reasonably

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purposeful discrimination to encompass state action that has discriminatory impact perpetuating the effects of past discrimination."); *id.* at 502 (Powell, J., concurring) ("It is beyond question * * * that Congress has the authority to identify unlawful discriminatory practices, to prohibit those practices, and to prescribe remedies to eradicate their continuing effects."); *City of Rome* v. *United States*, 446 U.S. 156, 176-177 (1980) (under its Civil War Amendment powers, Congress may prohibit conduct that is constitutional if it perpetuates the effects of past discrimination); *South Carolina* v. *Katzenbach*, 383 U.S. at 325-333; see also *Thornburg* v. *Gingles*, 478 U.S. 30, 35 (1986) (discriminatory effects test for voting); cf. *Washington* v. *Davis*, 426 U.S. 229, 242 (1976) ("an invidious discriminatory purpose may often be inferred from * * * the fact, if it is true, that the law bears more heavily on one race than another").

conclude that the demonstrated failure of state and local governments to undertake reasonable efforts to accommodate and integrate persons with disabilities within their programs, services, and operations would freeze in place the effects of their prior exclusion and isolation of individuals with disabilities, creating a self-perpetuating spiral of segregation, stigma, ill treatment, neglect, and degradation. Congress also correctly concluded that, by reducing stereotypes and misconceptions, integration reduces the likelihood that constitutional violations will recur. Cf. *Olmstead*, 527 U.S. at 600 (segregation "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life").

Second, to the extent that the accommodation requirement necessitates alterations in some governmental policies and practices, it is an appropriate enforcement mechanism for many of the same reasons that a prohibition on disparate impact is. Like practices with a disparate impact and literacy tests for voting,[54] governmental refusals to make even reasonable accommodations for persons with disabilities often perpetuate the consequences of prior unconstitutional discrimination, and thus fall within Congress's Section 5 power.[55]

Moreover, failure to accommodate the needs of qualified persons with disabilities may often result directly from

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[54] See *Oregon* v. *Mitchell*, 400 U.S. 112 (upholding nationwide ban on literacy tests even though they are not unconstitutional *per se*); *Gaston County* v. *United States*, 395 U.S. 285, 293, 296-297 (1969) (Congress can proscribe constitutional action, such as literacy tests, to combat ripple effects of earlier discrimination in other governmental activities); *South Carolina* v. *Katzenbach*, 383 U.S. at 333-334.

[55] Of course, the obligation to accommodate is less intrusive than the traditional disparate impact remedy because the government is not required to abandon the practice *in toto*, but may simply modify it to accommodate those otherwise qualified individuals with disabilities who are excluded by the practice's effect.

hidden unconstitutional animus and false stereotypes. As petitioners' amicus recognizes (Crim. Justice Legal Found. Br. 7), employers regularly adjust the schedules and work functions of employees to accommodate family needs, civic and charitable activities, union demands, and personal emergencies. The Disabilities Act simply makes certain that the refusal to accommodate an employee with a disability is genuinely based on unreasonable cost or actual inability to accommodate, rather than on discomfort with or false stereotypes about the disability or unfounded concern about the costs of accommodation. Likewise, building and program designs generally are structured to accommodate the target population. The Disabilities Act simply ensures that persons previously invisible to designers are now considered part of government's service constituency. "Just as it is unthinkable to design a building with a bathroom only for use by men, it ought to be just as unacceptable to design a building that can only be used by able-bodied persons. It is exclusive *designs*, and not any inevitable consequence of a disability that results in the isolation and segregation of persons with disabilities in our society." 3 *Leg. Hist.* 1987 n.4 (Laura Cooper).[56]

Third, Congress tailored the accommodation requirement to the unconstitutional governmental conduct it seeks to repair and prevent. The statute requires accommodations and modifications only where "reasonable," 42 U.S.C. 12112(b)(5)(A), 12131(2). Governments need not make accommodations or modifications that "impose an undue hardship" or require "fundamental alterations in the nature of a service, program, or activity," in light of their nature or

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[56] Likewise, child-size and adult-size water fountains routinely appear in buildings; requiring accessible fountains just expands that routine design process. 2 *Leg. Hist.* 993-994 (Jade Calegory) ("Black people had to use separate drinking fountains and those of us using wheelchairs cannot even reach some drinking fountains. We get thirsty, too.").

cost, agency resources, and the operational practices and structure of the position. 42 U.S.C. 12111(10), 12112(b)(5)(A); 28 C.F.R. 35.130(b)(7), 35.150(a)(3), 35.164; *Olmstead*, 527 U.S. at 606 n.16.

Further, based on the consistent testimony of witnesses and expert studies, Congress determined that the vast majority of accommodations entail little or no cost. For example, over 50% of accommodations in employment settings cost nothing; another 30% cost less than $500.[57] One local government official stressed that "[t]his bill will not impose great hardships on our county governments" because "the majority of accommodations for employees with disabilities are less than $50" and "[t]he cost of making new or renovated structures accessible is less than 1 percent of the total cost of construction." 2 *Leg. Hist.* 1443 (Nikki Van Hightower, Treasurer, Harris Co., Tex.).[58] Indeed, petitioners do not allege that enforcing an existing no-smoking policy for Ash or permitting Garrett to retain a job that she was fully capable of performing would entail unreasonable cost. And any costs are further diminished when measured

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[57] GAO, Briefing Report on Costs of Accommodations, *Americans with Disabilities Act: Hearing Before the House Comm. on Small Business*, 101st Cong., 2d Sess. 190 (1990); 2 *Leg. Hist.* 1638.

[58] See, *e.g.*, S. Rep. No. 116, *supra*, at 10-12, 89, 92; H.R. Rep. No. 485, *supra*, Pt. 2, at 34; 2 *Leg. Hist.* 1552 (EEOC Comm'r Evan Kemp); *id.* at 1077 (John Nelson); *id.* at 1388-1389 (Justin Dart); *id.* at 1456-1457; *id.* at 1560 (Jay Rochlin); 3 *Leg. Hist.* 2190-2191 (Robert Burgdorf); Task Force Report 27; *Spectrum* 2, 30, 70. The federal government, moreover, provides substantial funding to cover many of those costs. The Department of Transportation will pay 90% of the costs of purchasing accessible busses and transit systems, 49 U.S.C. 5323(i), and will pay 100% of the cost of curb cuts and ramps designed, as part of a federal-aid project, to make public sidewalks accessible. Transp. Equity Act, Pub. L. No. 105-178, § 1108(a)(3)(B), 112 Stat. 139. Congress has also authorized grants for the removal of architectural barriers, 42 U.S.C. 5305(a)(5), and, in the last two fiscal years, has provided States $10.1 billion to assist in the education of students with disabilities.

against the financial and human costs of denying persons with disabilities an education or consigning them to unemployment or low-paying jobs and excluding them from needed government services or the equal exercise of fundamental rights, thereby rendering them a permanent underclass. *Plyler*, 457 U.S. at 223-224, 227.

In short, "[a] proper remedy for an unconstitutional exclusion * * * aims to eliminate so far as possible the discriminatory effects of the past and to bar like discrimination in the future." *Virginia*, 518 U.S. at 547. Section 5 thus empowers Congress to do more than simply prohibit the creation of new barriers to equality; it can require States to tear down the walls they erected during decades of discrimination and exclusion. See *id.* at 550 n.19 (Equal Protection Clause itself can require modification of facilities and program to ensure equal access). The remedy for segregation is integration, not inertia.

c. ***Burden of Justification***: Petitioners point to features of the Disabilities Act (Br. 42-43 ¶¶ 1, 2, 3, 8), which impose on States a burden of justifying disability discrimination under the statute that is greater than what a court would require under Section 1 of the Fourteenth Amendment. They claim that, as a result, the Disabilities Act, like the Age Discrimination in Employment Act at issue in *Kimel*, unjustifiably "replaces one level of judicial scrutiny with another" (*id.* at 44) and is for that reason alone beyond Congress's enforcement authority under Section 5 of the Fourteenth Amendment. But in this respect the Disabilities Act is quite unlike the statutes at issue in *Kimel* and *Flores*, which, upon a minimal showing by a plaintiff, subjected constitutional state action to a level of rigid and probing review that this Court characterized as tantamount to strict scrutiny. See *Kimel*, 120 S. Ct. at 648; *Flores*, 521 U.S. at 534. The Disabilities Act requires a more substantial showing by the plaintiff and offers the defendant a less stringent standard of justification, thus preserving the States' capacity

to draw reasoned—and thus presumptively constitutional—distinctions based on disability or the genuine difficulty of accommodation. Nor is an elevated burden of justification necessarily an impermissible effort to redefine constitutional rights, as in *Flores*; it can be, as it is here and under Title VII, an appropriate means of rooting out hidden animus, and remedying and preventing discrimination that is unconstitutional under judicially defined standards.

3. The Disabilities Act's coverage is as broad as necessary

Finally, petitioners object (Br. 40-41) to the Disabilities Act's broad coverage. The operative question, however, is not whether Section 5 legislation is broad, but whether it is broader than necessary. The Disabilities Act is not. The history of unconstitutional treatment and the risk of future discrimination found by Congress pertained to all aspects of governmental operations. Only a comprehensive effort to integrate persons with disabilities would end the cycle of isolation, segregation, and second-class citizenship, and deter further discrimination. Integration in education alone, for example, would not suffice if there were not going to be jobs for those who received the education. Integration in employment would not suffice if persons with disabilities lacked transportation. Ending unnecessary institutionalization is of little gain if neither government services nor the social activities of public life (libraries, museums, parks, and recreation services) are accessible to bring persons with disabilities into the life of the community. And none of those efforts would suffice if persons with disabilities continued to lack equivalent access to government officials, courthouses, and polling places. In short, Congress chose a comprehensive remedy because it confronted an all-encompassing, inter-connected problem; to do less would be as ineffectual as "throwing an 11-foot rope to a drowning man 20 feet offshore and then proclaiming you are going more than halfway,"

S. Rep. No. 116, *supra*, at 13. "Difficult and intractable problems often require powerful remedies, and we have never held that § 5 precludes Congress from enacting reasonably prophylactic legislation." *Kimel*, 120 S. Ct. at 648. That describes the Disabilities Act to its very core.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

CONSTITUTION OF THE UNITED STATES

AMENDMENT XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

THE AMERICANS WITH DISABILITIES ACT OF 1990

§ 12101. Findings and purpose

(a) Findings

The Congress finds that—

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards

and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Title I of The Americans With Disabilities Act

§ 12102. Definitions

As used in this chapter:

(1) Auxiliary aids and services

The term "auxiliary aids and services" includes—

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) Disability

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) State

The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

§ 12111. Definitions

As used in this subchapter:

(1) Commission

The term "Commission" means the Equal Employment Opportunity Commission established by section 2000e-4 of this title.

(2) Covered entity

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat

The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee

The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer

(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions

The term "employer" does not include-

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of title 26.

(6) Illegal use of drugs

(A) In general

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C. 801 et seq.]. Such term does not include the use of a drug taken under supervision by a licensed health care

professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) Drugs

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C. 812].

(7) Person, etc.

The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 2000e of this title.

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include—

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship

(A) In general

The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

§ 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes—

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an

employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration—

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of

individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered entities in foreign countries

(1) In general

It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of corporation

(A) Presumption

If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception

This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination

For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on—

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control, of the employer and the corporation.

(d) Medical examinations and inquiries

(1) In general

The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) Preemployment

(A) Prohibited examination or inquiry

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if—

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that—

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) Examination and inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

§ 12113. Defenses

(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

(c) Religious entities

(1) In general

This subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(2) Religious tenets requirement

Under this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.

(d) List of infectious and communicable diseases

(1) In general

The Secretary of Health and Human Services, not later than 6 months after July 26, 1990, shall—

(A) review all infectious and communicable diseases which may be transmitted through handling the food supply;

(B) publish a list of infectious and communicable diseases which are transmitted through handling the food supply;

(C) publish the methods by which such diseases are transmitted; and

(D) widely disseminate such information regarding the list of diseases and their modes of transmissability[1] to the general public.

Such list shall be updated annually.

(2) Applications

In any case in which an individual has an infectious or communicable disease that is transmitted to others through the handling of food, that is included on the list developed by the Secretary of Health and Human Services under paragraph (1), and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.

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[1] So in original. Probably should be "transmissibility".

(3) Construction

Nothing in this chapter shall be construed to preempt, modify, or amend any State, county, or local law, ordinance, or regulation applicable to food handling which is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, which cannot be eliminated by reasonable accommodation, pursuant to the list of infectious or communicable diseases and the modes of transmissability[1] published by the Secretary of Health and Human Services.

§ 12114. Illegal use of drugs and alcohol

(a) Qualified individual with a disability

For purposes of this subchapter, the term "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of construction

Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who—

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

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[1] So in original. Probably should be "transmissibility".

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

(c) Authority of covered entity

A covered entity—

(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

(4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; and

(5) may, with respect to Federal regulations regarding alcohol and the illegal use of drugs, require that—

(A) employees comply with the standards established in such regulations of the Department of Defense, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Defense);

(B) employees comply with the standards established in such regulations of the Nuclear Regulatory Commission, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Nuclear Regulatory Commission); and

(C) employees comply with the standards established in such regulations of the Department of Transportation, if the employees of the covered entity are employed in a transportation industry subject to such regulations, including complying with such regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Transportation).

(d) Drug testing

(1) In general

For purposes of this subchapter, a test to determine the illegal use of drugs shall not be considered a medical examination.

(2) Construction

Nothing in this subchapter shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

(e) Transportation employees

Nothing in this subchapter shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to—

(1) test employees of such entities in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and

(2) remove such persons who test positive for illegal use of drugs and on-duty impairment by alcohol pursuant to paragraph (1) from safety-sensitive duties in implementing subsection (c) of this section.

§ 12115. Posting notices

Every employer, employment agency, labor organization, or joint labor-management committee covered

under this subchapter shall post notices in an accessible format to applicants, employees, and members describing the applicable provisions of this chapter, in the manner prescribed by section 2000e-10 of this title.

§ 12116. Regulations

Not later than 1 year after July 26, 1990, the Commission shall issue regulations in an accessible format to carry out this subchapter in accordance with subchapter II of chapter 5 of title 5.

§ 12117. Enforcement

(a) Powers, remedies, and procedures

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

(b) Coordination

The agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the Rehabilitation Act of 1973 [29 U.S.C. § 701 et seq.] shall develop procedures to ensure that administrative complaints filed under this subchapter and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this subchapter and the Rehabilitation Act of 1973. The Commission, the Attorney

General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations, and the Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed. Reg. 7435, January 23, 1981)) in regulations implementing this subchapter and Rehabilitation Act of 1973 not later than 18 months after July 26, 1990.

Title II, Part A, of The Americans With Disabilities Act

§ 12131. Definitions

As used in this subchapter:

(1) Public entity

The term "public entity" means—

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 2410(4) of title 49).

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

§ 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of

the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

§ 12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

§ 12134. Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

(b) Relationship to other regulations

Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of title 29. With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under such section 794 of title 29.

(c) Standards

Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this subchapter. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

Title IV of The Americans With Disabilities Act

§ 12201. Construction

(a) In general

Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.

(b) Relationship to other laws

Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter. Nothing in this chapter shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking in places of employment covered by subchapter I of this chapter, in transportation covered by subchapter II or III of this chapter, or in places of public accommodation covered by subchapter III of this chapter.

(c) Insurance

Subchapters I through III of this chapter and title IV of this Act shall not be construed to prohibit or restrict—

(1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(3) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapter [2] I and III of this chapter.

(d) Accommodations and services

Nothing in this chapter shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit which such individual chooses not to accept.

§ 12202. State immunity

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in[3] Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

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[2] So in original. Probably should be "subchapters".

[3] So in original. Probably should be "in a".

§ 12203. Prohibition against retaliation and coercion

(a) Retaliation

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

(b) Interference, coercion, or intimidation

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

(c) Remedies and procedures

The remedies and procedures available under sections 12117, 12133, and 12188 of this title shall be available to aggrieved persons for violations of subsections (a) and (b) of this section, with respect to subchapter I, subchapter II and subchapter III of this chapter, respectively.

§ 12204. Regulations by Architectural and Transportation Barriers Compliance Board

(a) Issuance of guidelines

Not later than 9 months after July 26, 1990, the Architectural and Transportation Barriers Compliance Board shall issue minimum guidelines that shall supplement the existing Minimum Guidelines and Requirements for Accessible

Design for purposes of subchapters II and III of this chapter.

(b) Contents of guidelines

The supplemental guidelines issued under subsection (a) of this section shall establish additional requirements, consistent with this chapter, to ensure that buildings, facilities, rail passenger cars, and vehicles are accessible, in terms of architecture and design, transportation, and communication, to individuals with disabilities.

(c) Qualified historic properties

(1) In general

The supplemental guidelines issued under subsection (a) of this section shall include procedures and requirements for alterations that will threaten or destroy the historic significance of qualified historic buildings and facilities as defined in 4.1.7(1)(a) of the Uniform Federal Accessibility Standards.

(2) Sites eligible for listing in National Register

With respect to alterations of buildings or facilities that are eligible for listing in the National Register of Historic Places under the National Historic Preservation Act (16 U.S.C. 470 et seq.), the guidelines described in paragraph (1) shall, at a minimum, maintain the procedures and requirements established in 4.1.7(1) and (2) of the Uniform Federal Accessibility Standards.

(3) Other sites

With respect to alterations of buildings or facilities designated as historic under State or local law, the guidelines described in paragraph (1) shall establish procedures equivalent to those established by 4.1.7(1)(b) and (c) of the Uniform Federal Accessibility Standards, and shall require, at a minimum, compliance with the requirements established in 4.1.7(2) of such standards.

§ 12205. Attorney's fees

In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

* * * * *

§ 12208. Transvestites

For the purposes of this chapter, the term "disabled" or "disability" shall not apply to an individual solely because that individual is a transvestite.

§ 12209. Instrumentalities of the Congress

The General Accounting Office, the Government Printing Office, and the Library of Congress shall be covered as follows:

(1) In general

The rights and protections under this chapter shall, subject to paragraph (2), apply with respect to the conduct of each instrumentality of the Congress.

(2) Establishment of remedies and procedures by instrumentalities

The chief official of each instrumentality of the Congress shall establish remedies and procedures to be utilized with respect to the rights and protections provided pursuant to paragraph (1).

(3) Report to Congress

The chief official of each instrumentality of the Congress shall, after establishing remedies and procedures for purposes of paragraph (2), submit to the Congress a report describing the remedies and procedures.

(4) Definition of instrumentality

For purposes of this section, the term "instrumentality of the Congress" means the following:,[1] the General Accounting Office, the Government Printing Office, and the Library of Congress,.[2]

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[1] So in original.

[2] So in original.

(5) Enforcement of employment rights

The remedies and procedures set forth in section 2000e-16 of this title shall be available to any employee of an instrumentality of the Congress who alleges a violation of the rights and protections under sections 12112 through 12114 of this title that are made applicable by this section, except that the authorities of the Equal Employment Opportunity Commission shall be exercised by the chief official of the instrumentality of the Congress.

(6) Enforcement of rights to public services and accommodations

The remedies and procedures set forth in section 2000e-16 of this title shall be available to any qualified person with a disability who is a visitor, guest, or patron of an instrumentality of Congress and who alleges a violation of the rights and protections under sections 12131 through 12150 or section 12182 or 12183 of this title that are made applicable by this section, except that the authorities of the Equal Employment Opportunity Commission shall be exercised by the chief official of the instrumentality of the Congress.

(7) Construction

Nothing in this section shall alter the enforcement procedures for individuals with disabilities provided in the General Accounting Office Personnel Act of 1980 and regulations promulgated pursuant to that Act.

§ 12210. Illegal use of drugs

(a) In general

For purposes of this chapter, the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of construction

Nothing in subsection (a) of this section shall be construed to exclude as an individual with a disability an individual who—

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs; however, nothing in this section shall be construed to encourage, prohibit, restrict, or authorize the conducting of testing for the illegal use of drugs.

(c) Health and other services

Notwithstanding subsection (a) of this section and section 12211(b)(3) of this title, an individual shall not be denied health services, or services provided in connection with drug rehabilitation, on the basis of the current illegal use of drugs if the individual is otherwise entitled to such services.

(d) "Illegal use of drugs" defined

(1) In general

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C. 801 et seq.]. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act [21 U.S.C. 801 et seq.] or other provisions of Federal law.

(2) Drugs

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C. 812].

§ 12211. Definitions

(a) Homosexuality and bisexuality

For purposes of the definition of "disability" in section 12102(2) of this title, homosexuality and bisexuality are not impairments and as such are not disabilities under this chapter.

(b) Certain conditions

Under this chapter, the term "disability" shall not include–

(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) compulsive gambling, kleptomania, or pyromania; or

(3) psychoactive substance use disorders resulting from current illegal use of drugs.

§ 12212. Alternative means of dispute resolution

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter.

§ 12213. Severability

Should any provision in this chapter be found to be unconstitutional by a court of law, such provision shall be severed from the remainder of this chapter and such action shall not affect the enforceability of the remaining provisions of this chapter.

Supreme Court, U.S.
FILED
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No. 99-1240

IN THE

Supreme Court of the United States

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA AND THE ALABAMA DEPARTMENT OF YOUTH SERVICES,

Petitioners,

v.

PATRICIA GARRETT AND MILTON ASH,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF FOR PETITIONERS

While there is much to lament about the way society historically has treated the disabled, there is nothing to lament about the way the Constitution permits government to respond to this complex and enduring social issue.

The Commerce Clause generally permits Congress to enact national employment and public-access standards regarding the disabled. And no aspect of the Constitution, whether the Tenth Amendment, the Eleventh Amendment or any other, bars Congress from making these national requirements generally applicable to most government employees and to most government services, if indeed not to all of them. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *EEOC v. Wyoming*, 460 U.S. 226, 243 (1983). That means Congress may make every affirmative-accommodation requirement, every disparate-impact test, every public-access mandate, and every other standard established by the ADA applicable to most if not all state employees. And that means Congress may authorize federal-court actions against state officials to enforce these statutory standards, and may require non-complying States to fund the costs and fees of bringing such actions. *See Ex Parte Young*, 209 U.S. 123 (1908); *Hutto v. Finney*, 437 U.S. 678 (1978).

What the Constitution still prohibits Congress from doing, however, is using its Commerce Clause powers freely to abrogate "a fundamental" attribute of "sovereignty"—"the States' immunity from suit" in money-damages actions. *Alden v. Maine*, 119 S. Ct. 2240, 2246 (1999). Before Congress may give one state resident access to money a State democratically levies from all residents, the Fourteenth Amendment requires something more—either that the State's underlying conduct violates the Constitution or that the States have brought these extra-constitutional duties upon themselves by engaging in a pattern of unconstitutional conduct. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

At stake in this litigation then is not whether Congress may enact "national legislation comprehensively prohibiting discrimination on the basis of disability" in the private and public sectors. U.S. Br. 10. It may, and it has. That is why petitioners do not challenge Congress's authority to permit Ms. Garrett or Mr. Ash to file an action against state officials to obtain their original job back or to obtain a reasonable accommodation in their current one. *See* Pet'r Br. 21. What separates the parties is not compliance with a national standard, but whether claimants may obtain retroactive relief from a state treasury above and beyond that compliance.

Yet not one respondent or *amicus curiae* has argued that the absence of a federal money-damages action has ever created, perpetuated, or otherwise been responsible for, constitutional violations against the disabled. Every single claim of discrimination that has been identified concerns matters that have been, or may be, resolved by *Ex Parte Young* actions against appropriate state officials for prospective injunctive relief. Be they zoning requirements, hiring practices or barriers to public services, not one of these potential concerns requires passage of the ADA's abrogation provision —42 U.S.C. § 12202. The fact is, society's vital quest for equality, integration, and dignity of the disabled has never been about money damages. To the extent the disabled have ever asked for anything more than the government already provides all citizens, it has always been about the forward-looking objective of removing barriers to access, not the backward-looking objective of erecting special private-damages actions. Nor was this distinction lost on Congress. In contrast to its treatment of the States, Congress chose not to expose executive-branch agencies of the federal government or private parties to many of the individual money-damages actions that it now wishes to impose on the States.

Once this modest framing of the issue has been accepted, and no one has contended that it should not be, nothing in the

briefs of respondents or their *amici* should give the heart or mind pause in reversing the decision below.

1. **Rational-basis review governs claims of unconstitutional discrimination against the disabled.** In answering Alabama's opening brief, respondents do not claim that *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), or any of the other cases applying rational-basis review to classifications based on disability, *see Heller v. Doe*, 509 U.S. 312 (1993), *Schweiker v. Wilson*, 450 U.S. 221 (1981), should be overruled. The alleged problem that the ADA purports to correct then is one defined by familiar features of constitutional litigation. Not only does a "strong presumption of validity" accompany such classifications, *Heller*, 509 U.S. at 319 (quotation omitted), *see City of Cleburne*, 473 U.S. at 446, but to overcome the presumption, the claimant must "negative every conceivable basis which might support" the classification, *Heller*, 509 U.S. at 320, whether the justification turns on something as pragmatic as "budgetary constraints," *Schweiker*, 450 U.S. at 238-39, or whether it turns on after-the-fact "rational speculation unsupported by evidence or empirical data," *Heller*, 509 U.S. at 320 (quotation omitted).

2. **Alleged discrimination under the ADA is not governed by rational-basis review**. Given this "virtually unreviewable" standard of review, *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993), respondents understandably do not try to justify the ADA on core section 5 grounds—that the Act merely asks the states to do what equal protection already requires. They thus do not counter Alabama's contention (Pet'r Br. 29) that the ADA "'prohibits substantially more state . . . decisions and practices than would likely be held unconstitutional under the . . . rational basis standard.'" (Quoting *Kimel v. Fla. Bd. of Regents*, 120 S. Ct. 631, 635 (2000) *Cf. W. Air Lines v. Criswell*, 472 U.S. 400, 421-22 (1985) (judicial scrutiny under the ADEA "is

inconsistent with" and "significantly different" from "rational basis" review).

3. **Congress did not identify a "widespread and persisting deprivation of constitutional rights."** *City of Boerne*, 521 U.S. at 526. That leaves the argument respondents have made—that the ADA represents a conditional exercise of Congress's power to command the states to do more than equal protection requires. In attempting to justify this assertion of power, one set of claimants argues (Resp't Br. 19) that "Congress made express findings that there was a pervasive problem of unconstitutional State and local government conduct," and the other claimant argues (U.S. Br. 8) that Congress found "a pervasive history of unconstitutional conduct by the States." These are serious charges, but in the end they do not hold.

The text of the law offers no support for this across-the-board indictment. While the statements of findings and purpose to be sure invoke the full "sweep of congressional authority," that shows only that Congress meant to do everything the Constitution permits it to do, not that it had established the necessary predicate for imposing these extra-constitutional duties on the States. And while the findings generally identify "discrimination against individuals with disabilities" as a "serious and pervasive social problem," 42 U.S.C. § 12101(a)(2), they do not find, much less establish, "that the State[s] had engaged in any *unconstitutional* [disability] discrimination." *Kimel*, 120 S. Ct. at 649 (emphasis added). Through nine extensive findings and four statements of purpose, the legislature never makes this essential point, never uses the word "unconstitutional," and never cites a single case or study to this effect. As the claimants acknowledge (Resp't Br. 18), the findings make "no distinction between public sector employment and private sector employment" in their claims of discrimination and "purposeful unequal

treatment" (42 U.S.C. § 12101(a)(7)), even though the Constitution limits one but not the other.

The Congress that enacted the ADA, like the one that passed the ADEA, never engaged in the debate that the Court is being asked to referee now—whether the States engaged in a pattern of unconstitutional conduct. As the statement of purpose attests, Congress responded to a "social problem," not a constitutional one; it established a "national mandate for the elimination of discrimination against individuals with disabilities," not for the elimination of unconstitutional conduct; and it ultimately "enforc[ed] the standards established in this chapter," not those of the Fourteenth Amendment. 42 U.S.C. §§ 12101(a)(2), (b)(1) & (3). That does not suffice.

4. **The legislative record fares no better in establishing any such pattern**. Just as the full Congress could not say that a form of state action that is "virtually unreviewable" under rational-basis review, *Beach Communications*, 508 U.S. at 316, had somehow generated a "widespread and persisting deprivation of constitutional rights," *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank.*, 119 S. Ct. 2199, 2210 (1999) (quotation omitted), neither could the committees, their staffs or the myriad interest groups that participated in the process identify any such pattern. Making this gap all the more conspicuous is the comprehensive nature of the legislative record, which as the federal government notes (U.S. Br. 6, 9) covered "40 years" "of legislative experience in the field, years of hearings and study, multitudinous submissions and testimonials by citizens across the Nation, and thoroughgoing congressional review." Yet, through it all, the record contains not one study or statement about constitutional violations.

Nor do the smattering of cases cited in the record support the exuberant claim (U.S. Br. 8) that there was "pervasive . . . unconstitutional conduct by the States." *City of Cleburne* is discussed not because it involved a constitutional violation by

a city government. It is mentioned only to criticize the standard of review the Court adopted there (and applied earlier in *Schweiker* and later in *Heller)*, and then to urge a more rigorous statutory standard in its place. *See* Pet'r Br. 37 (criticizing "consign[ment]" of cases "involving disability discrimination" to the standard that is the "least favorable to the individual") (citation omitted); *see also* Staff of the House Comm. on Educ. and Labor, *Legis. Hist. of Pub. L. No. 101-336: The Americans with Disabilities Act*, 101st Cong., 2d Sess. 963 (1990) ("House Comm. on Educ. and Labor") ("I find that the fact my two children are not protected under the Constitution to be unacceptable to me. And it is unacceptable to me that 36 million disabled Americans are not protected under the Constitution. I think we need this legislation."). And while *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), also is mentioned, that case did not involve a constitutional claim but a statutory one. *See* Senate Comm. on Labor and Human Resources, S. Rep. 101-116, 101st Cong., 1st Sess. 7 (1989).

The other cases discussed in the legislative record, all lower-court decisions, do not involve constitutional violations at all. *See Pushkin v. Regents of the Univ. of Colo.*, 658 F.2d 1372 (10th Cir. 1981) (Rehabilitation Act) (House Comm. on Educ. and Labor at 1617); *Heumann v. Bd. of Educ. of the City of New York*, 320 F. Supp. 623 (S.D.N.Y. 1970) (dismissing constitutional claim as moot because a *state* administrative appeal corrected the complaint) (House Comm. on Educ. and Labor at 1611); *State ex rel. Beattie v. Bd. of Educ. of the City of Antigo*, 172 N.W. 153 (Wis. 1919) (state law claim) (House Comm. on Educ. and Labor at 2242). These cases not only fail to show a track record of constitutional violations, but one of them even explains why. *See Pushkin*, 658 F.2d at 1384-85 ("mere fact that the University acted in a rational manner is no defense to an act of discrimination" under the Rehabilitation Act).

5. **Other portions of the legislative record fall well short of establishing state constitutional violations.** Having failed to identify anything in the text of the ADA or any cases cited in the legislative record establishing pervasive state misconduct, respondents fall back on "cobbl[ing] together" "isolated sentences clipped from floor debates and legislative reports" that purport to establish this pattern. *Kimel*, 120 S. Ct. at 649 (citation omitted). But, in doing so, they have no more success than the claimants did in *Kimel* or *City of Boerne*.

In some instances, the citation does not involve state action at all. *See, e.g.*, House Comm. on Educ. and Labor at 936 (U.S. Br. 29) (references to general discrimination by hotel and restaurant owners excluding persons with disabilities). In some instances, the problem had already been resolved. H.R. Rep. No. 485, 101st Cong., 2d Sess., Pt. 2 at 40 (1990) (U.S. Br. 31) (testifying about lack of accessibility to town hall, though ramp placed there a year earlier) ("H.R. Rep. No. 485"); ACIR, Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal 80 (April 1989) (Resp't Br. 33) (noting States have enacted laws regarding the removal of barriers in public buildings, and all States have statutes requiring new buildings to be accessible). In some instances, the citations refer to societal discrimination, not unconstitutional discrimination. *See, e.g.*, H.R. Rep. No. 485, Pt. 3 at 25 (U.S. Br. 36) ("These discriminatory policies and practices affect people with disabilities in every aspect of their lives"); House Comm. on Educ. and Labor at 1040 (U.S. Br. 15) ("several thousand documents submitted by citizens and organizations outlining discrimination and other barriers," involving "millions of Americans with disabilities" who are still "subject to massive discrimination"). In some instances, the citations involve requests for national uniformity and claims that the federal law will provide more protection than state laws. *See, e.g., id.* at 1272 (U.S. Br. 40) (ADA will show a national commitment to the disabled) (Rep. Owens); *id.* at 1506, 1508 (U.S. Br. 39)

(describing need for uniformity) (C. Brooks); H.R. Rep. No. 485, Pt.2 at 39 (U.S. Br. 39) (ADA will provide more protection than Massachusetts law); *Id.* at 19 (U.S. Br. 39) ("patchwork quilt" of federal law).

But in all instances, our review confirms, respondents' citations do not involve a finding of unconstitutional state conduct. Nor is there any way of knowing on this record whether such a showing could have been made with respect to these allegations. Yet such claims are "virtually unreviewable" and since the claimant must "negative every conceivable basis which might support" the governmental decision, it would turn customary rules of judicial review on their head to assume that these extra-judicial statements establish a pattern of unconstitutional activity. Much like the testimony in the ADEA record, the legislature here compiled statements of alleged discrimination that justify making the ADA generally applicable to state officials under the Commerce Clause, but did not compile a record that justifies making money-damages claims applicable to non-consenting States under section 5.

6. **Other cases identified by respondents do not establish a pattern of unconstitutional discrimination by States against the disabled.** Respondents next attempt to manufacture a legislative record of their own by citing case law that they (and not Congress) have uncovered. This, too, fails.

Most of the cases involve statutory, not constitutional, claims and for that reason alone are unhelpful. The following cases, for example, all arose under the Rehabilitation Act. *See Alexander v. Choate*, 469 U.S. 287 (1985); *Chalk v. U.S. Dist. Ct. Cent. Dist. of Cal.*, 840 F.2d 701 (9th Cir. 1988); *Halderman v. Pennhurst State Sch. & Hosp.*, 612 F.2d 84 (3d Cir. 1979); *Recanzone v. Washoe County Sch. Dist.*, 696 F. Supp. 1372 (D. Nev. 1988); *Doe v. Dolton Elementary Sch. Dist. No. 148*, 694 F. Supp. 440, 442 (N.D. Ill.1988); *Robertson v. Granite City Cmty. Sch. Dist. No. 9*, 684 F. Supp. 1002, 1006 (S.D. Ill. 1988); *Ray v. Sch. Dist. of Desoto*

County, 666 F. Supp. 1524, 1536 (M.D. Fla. 1987); *Thomas v. Atascadero Unified Sch. Dist.*, 662 F. Supp. 376 (C.D. Cal. 1986); *Garrity v. Gallen*, 522 F. Supp. 171 (D.N.H. 1981). *See also Bd. of Ed. v. Rowley*, 458 U.S. 176 (1982) (Education for all Handicapped Children Act); *Harrelson v. Elmore County*, 859 F. Supp. 1465 (M.D. Ala. 1994) (ADA); *Baxter v. City of Belleville*, 720 F. Supp. 720 (S.D. Ill. 1989) (Fair Housing Act); *see also Stump v. Sparkman*, 435 U.S. 349 (1978) (state judge immunity).

Some cases involve successful claims filed under state law in state court, which contradicts the suggestion that the ADA responds to a failure to resolve these issues at the local level. *See, e.g., Burris v. City of Phoenix*, 875 P.2d 1340 (Ariz. Ct. App. 1993) (cancer victim given job as firefighter); *Carney v. Carney*, 598 P.2d 36 (Cal. 1979) (child custody to handicapped parent); *Conn. Inst. for the Blind v. Conn. Comm'n on Human Rights & Opportunities*, 405 A.2d 618 (Conn. 1978) (no per se exclusion of visually handicapped from state jobs); *In re Marriage of R.R. and R.R.*, 575 S.W.2d 766 (Mo. Ct. App. 1978) (child custody to handicapped father); *Carroll v. Cobb*, 354 A.2d 355 (N.J. Super. Ct. 1976) (no per se exclusion of mentally retarded from right to vote); *Boyd v. Bd. of Registrars of Voters*, 334 N.E.2d 629, 632 (Mass. 1975) (same).

Other cases involve successful constitutional claims against the federal government, which are equally unhelpful. *See LaFaut v. Smith*, 834 F.2d 389 (4th Cir. 1987) (eighth amendment/federal prison); *Smith v. Fletcher*, 393 F. Supp. 1366, 1368 (S.D. Tex. 1975) (fourteenth amendment/NASA employee), *aff'd as modified*, 559 F.2d 1014 (5th Cir. 1977); *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972) (due process/education for handicapped children).

While still other cases involve constitutional violations by state and local governments, they by no means support respondents' claim (U.S. Br. 8) of "pervasive unconstitutional conduct by the States." Only two of these cases, it bears

emphasis, involve employment. Yet both challenge the actions of cities (not States), both turn on due process failings that cannot fairly be said to be remedied by the ADA, and one was not even necessary to the result. *See Gurmankin v. Costanzo*, 556 F.2d 184, 187 (3d Cir. 1977) (due process bars application of rule that blind teacher cannot take entrance examination because "she had an expectation, based on state law, of being admitted to the qualifying examination"); *Bevan v. N.Y. Teachers' Ret. Sys.*, 345 N.Y.S.2d 921 (Albany Cty. 1973) (city violated state law and due process by forcing retirement of blind teacher without a hearing). The ADA does not supply due process protections for state rights already in existence but instead is designed to create new federal rights in the first instance. And if the Eleventh Amendment does not extend to cities, *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 280 (1977), it remains to be seen how States can be held responsible for constitutional violations by these presumptively-separate entities.

The remaining cases, all outside of the employment context, suffer from these failings and more. Like *Bevan*, other cases involve disputes in which the court ruled on constitutional and statutory grounds, making the constitutional ruling unnecessary to the result. *See N.Y. State Ass'n for Retarded Children, Inc. v. Carey*, 466 F. Supp. 487, 497 (E.D.N.Y. 1979) (state law, Rehabilitation Act, Education of Handicapped Act, consent decree and Fourteenth Amendment/segregation of hepatitis B children); *Halderman v. Pennhurst State Sch. & Hosp.*, 446 F. Supp. 1295 (E.D. Pa. 1978) (eighth amendment and Rehabilitation Act/minimally adequate habilitation); *In re Adoption of Richardson*, 59 Cal. Rptr. 323 (Ct. App. 1967) (state law and equal protection/adoption by deaf and mute parents). One case, likewise, just involves a consent decree, which involves no constitutional finding at all. *See Pa. Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972) (state law and fourteenth amendment/state education of mentally retarded children).

The other cases involve procedures States must follow before they may commit an individual to an institution, concern the basic necessities of institutional care, and in one instance concern the appropriate education a State must provide to the disabled. *See Youngberg v. Romeo*, 457 U.S. 307 (1982) (substantive due process/ right to safe conditions of confinement and freedom from unreasonable restraints); *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (due process/confinement of non-dangerous mentally-ill patient); *Thomas S. v. Flaherty*, 699 F. Supp. 1178 (W.D.N.C. 1988) (due process/habilitation, unreasonable restraint and safe conditions); *Manhattan State Citizens' Group, Inc. v. Bass*, 524 F. Supp. 1270 (S.D.N.Y. 1981) (state constitution, due process/right to vote of involuntarily committed patients); *Panitch v. Wisconsin*, 444 F. Supp. 320, 322 (E.D. Wis. 1977) (equal protection/appropriate education for handicapped children); *N.Y. State Ass'n for Retarded Children v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973) (eighth amendment/safe conditions and medical care at institution for mentally retarded); *Wyatt v. Stickney*, 344 F. Supp. 387, 390 (M.D. Ala. 1972) (substantive due process/habilitation). But these cases, many of which established new constitutional doctrines at the time, cannot fairly be said to supply the necessary predicate for the disparate-impact and affirmative-accommodation provisions of Title I in employment and Title II in other public services. Not only is there the most tenuous of connections between these cases and the ADA (none, indeed, was mentioned in the legislative record), but two federal laws were already on the books by 1990 that specifically regulated these areas, the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 *et seq.* and the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.*

The same is true of the Eighth Amendment violations. *See Parrish v. Johnson*, 800 F.2d 600 (6th Cir. 1986) (deliberate indifference to paraplegic prisoner); *Leach v. Shelby County*

Sheriff, 891 F.2d 1241 (6th Cir. 1989) (same). While the ADA may cover state prisons, *see Pa. Dep't of Corrections v. Yeskey*, 524 U.S. 206 (1998), nothing in it is designed to remediate Eighth Amendment violations against the disabled or for that matter any of the other constitutional violations committed against other prisoners. The two zoning cases (like most of these citations) again involve cities, and are of little utility for additional reasons as well. One applies heightened scrutiny rather than rational-basis review. *See J.W. v. City of Tacoma*, 720 F.2d 1126, 1129-30 (9th Cir. 1983) (applying "special judicial attention" to permit request for home for the mentally ill). The other involves discrimination against the disabled *and* the elderly, making it no more useful here than it was in *Kimel*. *See Burstyn v. City of Miami Beach*, 663 F. Supp. 528 (S.D. Fla. 1987) (application of zoning ordinance to home for elderly or handicapped violated equal protection).

But even if all of this were not the case, even if respondents (or Congress) had identified some isolated constitutional violations by a handful of States, that is "insufficient to support Congress' [extension of the ADA] to every State of the Union" and to do so with respect to every term and condition of state employment as well as every government service and building. *Kimel*, 120 S. Ct. at 649. In the final analysis, as respondents' carefully-worded arguments ultimately attest, they are claiming not a record of unconstitutional discrimination but of "discrimination" in general. That contention failed in *Kimel*, *Florida Prepaid*, and *City of Boerne*. It should fail here.

7. **The eugenics movement undermines rather than advances respondents' claims.** Respondents also rely on dispiriting laws from the early twentieth century that the gravitational forces of representative government cured long before Congress enacted the ADA in 1990. Doubtless, the eugenics movement, Social Darwinism and other claimed advances of the past prove the ease with which time can make yesterday's progressives look like today's reactionaries. And

these episodes may well prove that when Justice Holmes "erred," the "lucidity of his reasoning" showed that his explanation was "'wrong clearly,'" *Fulton Corp. v. Faulker*, 516 U.S. 325, 345 (1996) (quoting Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593 (1958)). *See Buck v. Bell*, 274 U.S. 200 (1927); *cf. City of Cleburne*, 473 U.S. at 461-62 (Marshall, J., concurring in part and dissenting in part) (discussing "grotesque" eugenics movement). Yet in this instance the legislative process validated the central premise of rational-basis review—the "Constitution['s presumption] that . . . even improvident decisions will eventually be rectified by the democratic process," *Vance v. Bradley*, 440 U.S. 93, 97 (1979) (footnote omitted). When state democracies force compassionless laws into desuetude and later into repeal, and do so after withstanding judicial review no less, *see Buck v. Bell*, only a most paradoxical interpretation of the Enforcement Clause would allow Congress to come in after the hard work has already been done in order to correct what has long since been corrected.

That is not to say that the States have eliminated all restraints on the mentally disabled. As respondents note, many laws continue to place competency restrictions on the right to vote, marry and procreate. But these regulations turn not on furthering harsh Darwinian objectives, but on recognizing that a basic level of competency is required before anyone can meaningfully exercise these rights. Just as those of competent mind may make these decisions in whatever way they wish, so a civilized legal system requires that guardians of the incompetent be permitted occasionally to make some of these decisions in their place. *See, e.g., In re Grady*, 426 A.2d 467, 480-81 (N.J. 1981) ("Lee Ann Grady has the same constitutional right of privacy as anyone else to choose whether or not to undergo sterilization. Unfortunately, she lacks the ability to make that choice for herself. . . [H]aving the choice made in her behalf produces a more just and compassionate

result than leaving Lee Ann with no way of exercising a constitutional right."); Cal. Prob. Code § 1950 (same). While these laws certainly "discriminate" in the sense of treating the incompetent differently from others, no one can tenably argue that they violate the Constitution.

Far from identifying a record of incorrigible state activity, respondents in the end have not identified any pattern of state constitutional violations involving public employment or public access. The most they have done is to identify alleged instances of societal discrimination and controversial state practices that the "democratic process" long ago eliminated. Yet that history hardly supplies the necessary predicate for imposing these extra-constitutional requirements on the States. Section 5 after all corrects political dysfunction, not political virtue, and if there is dysfunction here it relates to a failure to appreciate that "[c]ongressional action under the Enforcement Clause of the Fourteenth Amendment" does have and should have "very significant consequences." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 35 (1981) (White, J., joined by Brennan, Marshall, JJ., dissenting in part) (citation omitted); *see id.* at 16. Neither States, their residents nor Congress have anything to gain from compromising this inquiry. If the core goal of section 5 is to root out Fourteenth Amendment violations, a casual inquiry into whether such violations exist will ultimately disserve rather than advance that essential end. What the Court said about the ADEA in *Kimel* remains pertinent in this instance: "Congress' failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field." 120 S. Ct. at 650.

8. **Congress did not identify any risk of *future* unconstitutional discrimination**. As Alabama showed in its opening brief (Pet'r Br. 37-38), the panoply of state and federal options available today to remediate or prevent a constitutional

violation make the possibility of such acts going unremedied exceedingly remote. Respondents nowhere claim that Congress felt differently about the matter. In point of fact, neither the text of the ADA nor the legislative record contains any such finding.

All respondents have done instead is attack the coverage of the pertinent state laws. In tandem, the federal government says (U.S. Br. 32) that Alabama "grossly exaggerates the coverage of those laws," while the private respondents say (Resp't Br. 36) the description of the state laws is "grossly inaccurate." On what basis this harmonized claim rests, however, remains unclear. No one has rebutted these truths: Before 1990, all 50 States prevented discrimination against the disabled under their own laws or administrative regulations, all 50 States provided some form of monetary remedy for such discrimination against the sovereign, all 50 States had policies advancing the hiring of persons with disabilities, and all 50 States had extensive other measures designed proactively to accommodate the needs of the disabled. *See* Pet'r Br. Appendix.

The apparent source of the "grossly inaccurate" claim, which respondents themselves never explain, appears to be an *amici curiae* brief filed by the National Association of Protection & Advocacy Systems, *et al.* That brief, however, makes no effort to rebut this essential point: A 50-State body of statutory law that goes well beyond what the Constitution requires, and indeed in 1990 was "so far out in front of the federal government, it's not funny," Pet'r Br. 4 (quoting Rep. Moakley), makes implausible the claim that a broad prophylactic law is needed to deter future constitutional violations. Rather than address this critical issue, the *amici* brief makes the unremarkable observation that the ADA places more stringent requirements on the States than some state laws do. That, however, is to be expected when 51 different sovereigns and 51 different legislative bodies tackle a complex

social problem. A cognizable risk of constitutional violations does not arise when some States provide less stringent statutory protections than a federal statute does.

Neither does such a risk arise simply because some States offer few monetary remedies or, like Alabama, do so only in the form of back pay available to some state employees in an administrative proceeding. The same, it turns out, can be said of the federal government. When it comes to the types of public-access requirements covered by Title II, the federal government provides no money-damages remedy at all. *See Lane v. Pena*, 518 U.S. 187 (1996). Surely, if the Constitution permits "Congress [to] believe[ ] it had greater direct authority over federal programs, through the use of its appropriations and oversight power, and thus less need of additional enforcement through private damages actions," U.S. Br. 4 n.1, it permits Alabama to embrace the same policy for its programs.

All of this is not to say, as respondents and their *amici* seem to suggest (*e.g.*, Resp't Br. 36) that the States claim to have cornered the market on legislative expertise in this area, or claim that the existence of these state laws precludes the necessity of enacting a federal standard under the Commerce Clause or the spending power. Respondents and their *amici* know better. Before Congress may place all 50 States in the section 5 dock, *City of Boerne* and its progeny require a problem of national import and of constitutional dimension. Yet the existence of these state laws, together with the minimal strictures of rational basis review and the absence of any pertinent track record of unconstitutional activity, show that the risk that unconstitutional acts will go unremedied has long been remote and by 1990 was virtually non-existent. As *Kimel* acknowledged, "State employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every State of the Union." 120 S. Ct. at 650 (footnote omitted). The same is true here.

9. **The ADA is not proportional and congruent section 5 legislation.** It is difficult to maintain, as the federal government does (U.S. Br. 43), both that the ADA was properly "modeled" on Title VII and that it represents a proportionate exercise of the Enforcement Clause. Title VII bars classifications that are presumptively unconstitutional, while the ADA bars classifications that are presumptively constitutional. Disability and "[a]ge classifications, unlike governmental conduct based on race or gender, cannot be characterized as 'so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy.'" *Kimel*, 120 S. Ct. at 645 (quoting *City of Cleburne*, 473 U.S. at 440). And disability, like age and unlike race or gender, "does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it." *Id.* Much as the ADEA improperly "elevated the standard for analyzing age discrimination to heightened scrutiny," *id.* at 648, the ADA impermissibly does the same.

It also is difficult to maintain both that the ADA's money-damages remedies are proportional in nature and that the federal government need not impose them on itself or on private parties in the same way. Yet that exactly describes the current legislative landscape. When the States violate Title II of the ADA, they expose themselves to retroactive money-damages actions, sometimes of great magnitude, *see* Brief *Amici Curiae* of Hawaii, et al. at 18-27, while neither the federal government nor private businesses face any such consequence under the ADA or any comparable statute. In the aftermath of the United States' concession of "less need of additional enforcement through private damages actions" against the federal government in this context (*id.*), and in the absence of any explanation why "private damages actions" have ever been needed to remedy or deter the allegedly unconstitutional conduct targeted by this provision, it would seem that this gap in the legislative record by itself suffices to

defeat the abrogation provision. While as a matter of policy Congress may well wish to lead by direction rather than example, it cannot be the case that a national effort to root out "massive, society-wide discrimination" (U.S. Br. 16 (quoting S. Rep. No. 101-116, at 8-9 (1989)) may tenably be deemed a proportionate response when the attempt to remedy that problem inexplicably commands far more of the States than of the National Sovereign.

In an understandable effort to distance the ADA from the ADEA, the United States also claims (U.S. Br. 41) that "the gap between what the Constitution and this legislation proscribes is far narrower than it was in *Kimel*." This point is never developed, and it remains unclear how it could be. Both forms of discrimination, contrary to respondents' contention (Resp't Br. 30-31), deal with precisely the same imperfect generalizations—that "physical and mental capacity sometimes diminish with age," *Gregory v. Ashcroft*, 501 U.S. 452, 472 (1991), and that handicaps sometimes diminish "physical and mental capacity." Not only do age and disability discrimination thus receive the same level of constitutional scrutiny but the ADA also contains additional disparate-impact and affirmative-accommodation requirements that the ADEA does not. Any "gap" between the statutory and constitutional tests is far broader here than it was in *Kimel*.

Nor do respondents offer any explanation why the ADA's disparate-impact and affirmative-accommodation requirements are proportionate efforts to identify and correct constitutional violations. Neither test is required under any level of constitutional review, even heightened scrutiny. And the cases on which the United States relies (U.S. Br. 43 n.53) to sustain this type of test all involve race discrimination. No doubt "[d]ifficult and intractable problems often require powerful remedies." *Kimel*, 120 S. Ct. at 636, 648. But that is true of difficult and intractable "constitutional" problems, such as race and gender discrimination where the stringent bar against

considering these factors justifies the need to "police" (Resp. Br. 43) what by definition are likely to be underlying constitutional violations. That is not true of disability discrimination, where the Constitution presumptively allows government to consider the physical and mental acuity of its citizens and where no "substantial risk of violating the Constitution" (U.S. Br. 7) accordingly exists. Here, in other words, the ADA polices government decisions that are exceedingly likely to be constitutional, making these types of requirements even less proportional than the more-modest disparate-treatment requirements in the ADEA.

All of respondents' other explanations for imposing these different burdens of proof and different standards of liability on the States operate at such a high level of generality that they would sweep away any meaningful limit on the section 5 power. Above all else, respondents never explain how the wide range of practices that the ADA proscribes could not conceivably be based on some rational policy or budgetary basis, which is all that the Constitution requires. The Act plainly bars "substantially more state . . . practices than would likely be held unconstitutional." *Kimel*, 120 S. Ct. at 635.

10. **The exercise of a prophylactic section 5 power in the setting of rational-basis review has not been justified here or in any other comparable setting**. The United States draws no dispute from us when it claims that "Congress's enforcement power . . . extends to the full spectrum of conduct that violates the Equal Protection Clause, and not merely to the class of governmental actions that this Court stands ready to invalidate under heightened scrutiny." U.S. Br. 39 Plainly, section 5 empowers Congress to create remedies for *all* constitutional violations covered by section 1 of the Fourteenth Amendment. But that is not what the ADA does. Instead, it claims to be requiring obedience to a constitutional guarantee by passing a law that has meaning only as applied to States that have obeyed the requirement. The statute does not create a

remedy, but a new standard. And an interpretation of the Enforcement Clause that permits prophylaxis in this setting, or is any other involving the "virtually unreviewable" requirements of rational-basis review, countenances not a power to "enforce a constitutional right," but a power to "chang[e] what the right is." *City of Boerne*, 521 U.S. at 519.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 2000

UNIVERSITY OF ALABAMA BOARD OF TRUSTEES
Petitioner,

v.

GARRETT, ET AL
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF COALITION FOR LOCAL SOVEREIGNTY IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does subsection 5 of the Fourteenth Amendment grant Congress power to override a State's immunity from suit in federal court, as guaranteed by the Eleventh Amendment?

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INTEREST OF AMICUS CURIAE[1]

Coalition for Local Sovereignty is made up of state and local officials, as well as concerned citizens, working to uphold the principle of local self-government and community based decision making. As the only national organization dedicated exclusively to the restoration of local self-government, we possess a unique perspective on such cases.

Counsel to the petitioner, and counsel to the respondent, have consented to the filing of this *amicus* brief. Consent letters are on file with the Clerk of the Court.

SUMMARY

For over a century this Court has consistently ruled that the States' immunity from prosecution in federal court, which is guaranteed by the Eleventh amendment, is absolute and contains no exceptions or dilutions. In dozens of precedents over that time, this Court has repeatedly – by both implicit and explicit statements – refused to rule that the Fourteenth amendment affected the States' sovereign immunity in any way. This Court has repeatedly ruled that a state officer can only be sued in federal court when such suit was legally a suit against an individual who happens to be a state officer, and not legally a suit against the State.

The 1976 ruling in *Fitzpatrick v. Bitzer*, that the States' Eleventh Amendment immunity can be nullified by Congress when enforcing provisions of the Fourteenth amendment, was a judicial novelty – indeed, *Fitzpatrick* itself acknowledges that the Court had never in the previous 108

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[1] This brief was authored by counsel for Coalition for Local Sovereignty, no other person has made any monetary contribution for its preparation or submission.

years of Fourteenth Amendment jurisprudence acknowledged such a doctrine. The *Fitzpatrick* doctrine is Constitutionally unsound, contradictory of dozens of precedents, contrary to fundamental principles of federalism, and runs afoul of this Court's recent reinvigoration of Eleventh Amendment immunity.

I. Dozens of precedents affirm there are no exceptions to State immunity

Since this Court in recent decisions (*Seminole Tribe v. Florida, Alden v. Maine, Kimmel v. Florida, et al*) has reinvigorated the States' Eleventh Amendment immunity from suit in federal court, we take it as an established fact that, at least in terms of the unamended Constitution, State immunity from prosecution in federal courts is absolute and unqualified.

Does the Fourteenth Amendment's subsection 5 which grants Congress "power to enforce, by appropriate legislation, the provisions of this article" include the power to expand the jurisdiction of Article 3 Courts, beyond that previously granted by the Constitution?

Let us, then, begin by examining Supreme Court rulings directly following the adoption of the Fourteenth amendment.

It is, of course, acknowledged by all, that one of the most important cases in Eleventh amendment interpretation was EX PARTE YOUNG, 209 U.S. 123 (1908), which ruled that State officers could be subjected to suit in federal court, *as individuals*, for attempting to enforce a State law deemed unconstitutional. We agree that "Ex parte Young was a watershed case in which this Court held that the Eleventh Amendment did not bar an action in the federal courts seeking to enjoin the Attorney General of Minnesota from enforcing

a statute claimed to violate the Fourteenth Amendment (EDELMAN v. JORDAN, 415 U.S. 651 (1974)).

After reviewing numerous precedents in which state officers were sued in federal court, the *Young* opinion concluded that whenever such suits had been allowed it was because the suits were against such people in the their individual and private capacities and not as public agents. This is the same conclusion reached in a survey of the same cases in *Hans* which ruled that while there were cases of individual officers being sued that:

> In all these cases the effort was to show, and the court held, that the suits were not against the state or the United States, but against the individuals; conceding that, if they had been against either the state or the United States, they could not be maintained. *Hans v. Louisiana*, 134 U.S. 504.

Following *Hans* and the entire line of Eleventh Amendment cases, the *Young* decision concluded that:

> Although the case is one arising under the removal act, and does not involve the Eleventh Amendment, it nevertheless illustrates the question now before us, and reiterates the doctrine that **the state is not a party** to a suit simply because the state railroad commission is such party.

Again, the court specifically ruled that the case could proceed in federal court specifically because the state was *not* a party to the suit.

There is no doubt that federal courts can have cognizance of some suits involving individuals who happen to be state officers, or which claims arise from activities of

state employees on the job. A police officer who steals from an individual from out of state, could certainly be sued in federal court for damages, and he could not invoke immunity. Even an officer who murders a person on orders from the governor could be sued for wrongful death if the person killed were a citizen of another state. That principle is not in dispute, nor has ever been questioned. What the *Young* case ruled on was whether the suit against Young was one against him in his individual capacity or against the State. The Court, on this matter of fact, incorrectly ruled that it was one against him as an individual. The case did not, however, ever call into question that States enjoy absolute immunity from prosecution.

'Even more interestingly for the current discussion, the *Young* case involved possible violations of the Fourteenth Amendment, and the Court had some vary specific things to say about the relation of the Eleventh and Fourteenth amendments:

> The Eleventh Amendment prohibits the commencement or prosecution of any suit against one of the United States by citizens of another state or citizens or subjects of any foreign state. The Fourteenth Amendment provides that no state shall deprive any person of life, liberty, or property without due process of law, nor shall it deny to any person within its jurisdiction the equal protection of the laws. The case before the circuit court proceeded upon the theory that the orders and acts heretofore mentioned would, if enforced, violate rights of the complainants protected by the latter amendment. We think that whatever the rights of complainants may be, they are largely founded upon that Amendment, but a decision of this case does not require an examination or decision of the question whether its adoption in any

> way altered or limited the effect of the earlier Amendment. **We may assume that each exists in full force, and that we must give to the Eleventh Amendment all the effect it naturally would have, without cutting it down or rendering its meaning any more narrow than the language, fairly interpreted, would warrant.**

Far from saying that the Fourteenth amendment in any way limited the Eleventh amendment, this Court ruled that "we may assume that each exists in full force"

The dissenting opinion of Justice Harlan also emphasizes the view of the entire Court that the Eleventh amendment "exists in full force." Justice Harlan notes that:

> The essential and only question now before us or that need be decided is whether an order by the Federal court which prevents the state from being represented in its own courts, by its chief law officer, upon an issue involving the constitutional validity of certain state enactments, does not make a suit against the state within the meaning of the Eleventh Amendment. If it be a suit of that kind, then, *it is conceded*, the circuit court was without jurisdiction to fine and imprison the petitioner, and he must be discharged, whatever our views may be as to the validity of those state enactments. This must necessarily be so unless the Amendment has less force and a more restricted meaning now than it had at the time of its adoption, and unless a suit against the attorney general of a state, in his official capacity, is not one against a state under the Eleventh Amendment when its determination depends upon a question of constitutional power or right under the Fourteenth Amendment.

Justice Harlan says that "it is conceded" that the Eleventh amendment exists in full force, as we noted just above. But then, Harlan adds a stronger position of his own declaring:

> *In my opinion the Eleventh Amendment has not been modified in the slightest degree as to its scope or meaning by the Fourteenth Amendment*, and a suit which, in its essence, is one against the state, remains one of that character and is forbidden even when brought to strike down a state statute alleged to be in violation of that clause of the Fourteenth Amendment, forbidding the deprivation by a state of life, liberty, or property without due process of law. If a suit be commenced in a state court, and involves a right secured by the Federal Constitution, the way is open under our incomparable judicial system to protect that right, first, by the judgment of the state court, and ultimately by the judgment of this court, upon writ of error. But such right cannot be protected by means of a suit which, at the outset, is, directly or in legal effect, one against the state whose action is alleged to be illegal. That mode of redress is absolutely forbidden by the Eleventh Amendment, and cannot be made legal by mere construction, or by any consideration of the consequences that may follow from the operation of the statute. Parties cannot, in any case, obtain redress by a suit against the state. *Such has been the uniform ruling in this court.*

While this is the dissenting opinion in this case, Justice Harlan's conclusion that "Such has been the uniform ruling of this court." is a statement of fact which cannot seriously be contested. Moreover, the dispute between Harlan and the majority, was *not* over the question of whether there were exceptions to Eleventh Amendment immunity –

everyone agreed that there were none. The disagreement was over a judgement of fact that this particular case constituted a suit against a State.

It should be emphasized that the Court's refusal to acknowledge Young's immunity was in no way based upon any appeal to the Fourteenth amendment, but was entirely based upon the claim that the suit against Young was *not* a suit against Minnesota.

Justice Harlan cites a dozen precedents to show that "Such has been the uniform ruling of this court." Space consideration here prevent us from citing all of these examples. We have already seen that *Hans* acknowledged no exceptions, similarly PENNOYER v. MCCONNAUGHY, 140 U.S. 1 (1891) makes clear that there are no exceptions to Eleventh Amendment immunity:

> It is well settled that no action can be maintained in any federal court by the citizens of one of the states against a state, without its consent, even though the sole object of such suit be to bring the state within the operation of the constitutional provision which provides that 'no state shall pass any law impairing the obligation of contracts.' *This immunity of a state from suit is absolute and unqualified*, and the constitutional provision securing it is not to be so construed as to place the state within the reach of the process of the court. . . . In re Ayers, 123 U.S. 443; State v. Jumel, 107 U.S. 711; Antoni v. Greenhow, 107 U.S. 769; Cunningham v. Railroad Co., 109 U.S. 446; Hagood v. Southern, 117 U.S. 52.

The statement that "immunity of a state from suit is absolute and unqualified" leaves no room for the suggestion that the Court in 1891 believed any exceptions existed to the

Eleventh Amendment– whether from the Fourteenth Amendment or anywhere else.

If this Court did not acknowledge any exceptions to Eleventh Amendment immunity, in *Young*, was there any point at which this Court did acknowledge any such exceptions from the Fourteenth amendment? A brief survey of some of the precedents throughout the Twentieth Century shows that prior to 1976, the Court never imagined any exceptions.

In 1920 this Court addressed the sovereign immunity question in DUHNE v. STATE OF NEW JERSEY, 251 U.S. 311, ruling:

> it has been long since settled that *the whole sum of the judicial power granted by the Constitution to the United States* does not embrace the authority to entertain a suit brought by a citizen against his own state without its consent. *Hans v. Louisiana*, 134 U.S. 1; *North Carolina v. Temple*, 134 U.S. 22; *California v. Southern Pacific Co.*, 157 U.S. 229; *Fitts v. McGhee*, 172 U.S. 516, 524.

In 1920 this Court recognized no exceptions to Eleventh Amendment immunity.

The very next year in IN RE NEW YORK, 256 U.S. 490 (1921) this Court noted:

> That a state may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that *it has become established by repeated decisions of this court that* ***the entire judicial power granted by the Constitution*** *does not embrace authority to entertain a suit brought by*

> *private parties against a state without consent given*; not one brought by citizens of another state, or by citizens or subjects of a foreign state, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the amendment is but an exemplification. *Beers v. Arkansas*, 20 How. 527, 529; *Railroad Co. v. Tennessee*, 101 U.S. 337, 339; *Hans v. Louisiana*, 134 U.S. 1, 10-17; *North Carolina v. Temple*, 134 U.S. 22; *Fitts v. McGhee*, 172 U.S. 516; *Palmer v. Ohio*, 248 U.S. 32, 34; *Duhne v. New Jersey*, 251 U.S. 311.

In 1921 this Court recognized no exceptions to Eleventh Amendment immunity.

In 1934 in PRINCIPALITY OF MONACO v. STATE OF MISSISSIPPI, 292 U.S. 313 this Court ruled that:

> To suits against a State, without her consent, brought by citizens of another State or by citizens or subjects of a foreign State, *the Eleventh Amendment erected an absolute bar*. Superseding the decision in Chisholm v. Georgia, supra, the Amendment established in effective operation the principle asserted by Madison, Hamilton, and Marshall in expounding the Constitution and advocating its ratification. The 'entire judicial power granted by the Constitution' does not embrace authority to entertain such suits in the absence of the State's consent. Ex parte State of New York, No. 1, supra, page 497 of 256 U.S. 41 S.Ct. 588; Missouri v. Fiske, 290 U.S. 18, 25, 26 S., 54 S.Ct. 18.

In 1934 this Court said that *the Eleventh Amendment erected an absolute bar*" to suits, and clearly considered that no substantial change to Eleventh Amendment immunity had occurred between the ratification of the Eleventh Amendment and 1934.

Ten years later, this Court again affirmed that only actions against individuals could be allowed. The Court

noted in GREAT NORTHERN LIFE INS. CO. v. READ, 322 U.S. 47 (1944), that

> The right of petitioner to maintain this suit in a Federal court depends, first, upon whether the action is against an individual or against the State of Oklahoma. Secondly, if the action is determined to be against the state, the question arises as to whether or not the state has consented to suit against itself in the Federal court.

Even in the early 1970's when state immunity was under serious attack, sovereign immunity was still upheld, in cases such as *Missouri Public Health* and *Edelman*:

> Although the Eleventh Amendment is not literally applicable since petitioners who brought suit are citizens of Missouri, it is established that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State. EMPLOYEES v. MISSOURI PUBLIC HEALTH DEPT., 411 U.S. 279 (1973)

> While the Amendment by its terms does not bar suits against a State by its own citizens, this Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State. Hans v. Louisiana, 134 U.S. 1 (1890); Duhne v. New Jersey, 251 U.S. 311 (1920); Great Northern Life Insurance Co. v. Read, 322 U.S. 47 (1944); Parden v. Terminal R. Co., 377 U.S. 184 (1964); Employees v. Department of Public Health and Welfare, 411 U.S. 279 (1973). It is also well established that even though a State is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment. EDELMAN v. JORDAN, 415 U.S. 651

(1974)

Finally, it is worth citing *Parden*, because, although the *Parden* court was openly hostile to the doctrine of Eleventh Amendment immunity, it nevertheless acknowledged no exceptions.

> Recognition of the congressional power to render a State suable under the FELA does not mean that the immunity doctrine, as embodied in the Eleventh Amendment with respect to citizens of other States and as extended to the State's own citizens by the Hans case, is here being overridden. *It remains the law that a State may not be sued by an individual without its consent.* Our conclusion is simply that Alabama, when it began operation of an interstate railroad approximately 20 years after enactment of the FELA, necessarily consented to such suit as was authorized by that Act. PARDEN v. TERMINAL R. CO., 377 U.S. 184 (1964)

Even the discredited *Parden* case acknowledged no exceptions to Eleventh Amendment immunity: "It remains the law that a State may not be sued by an individual without its consent."

Despite repeated claims from opponents of federalism that this Courts recent rulings on state immunity was a work of judicial activism, it would, in fact, be hard to find a matter of legal interpretation which has been more clearly or more consistently upheld by this court than the doctrine of state immunity from prosecution in federal court.

A. Fitzpatrick v. Bitzer created a 14th Amendment exception out of thin air

Given the unbroken string of precedents involving Eleventh amendment immunity, from whence came the *Fitzpatrick* decision? *Fitzpatrick* cited three precedents for the novel

view that the Eleventh Amendment was somehow limited by the Fourteenth Amendment (*Ex parte Virginia*, *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966); *Mitchum v. Foster*, 407 U.S. 225, 238 -239 (1972)). Yet *Fitzpatrick* then acknowledges:

> It is true that *none* of these previous cases presented the question of the relationship between the Eleventh Amendment and the enforcement power granted to Congress under 5 of the Fourteenth Amendment. But we think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, see *Hans v. Louisiana*, are necessarily limited by the enforcement provisions of 5 of the Fourteenth Amendment.

This is an explicit acknowledgment that the Fitzpatrick doctrine is new and originates in 1976. After more than a century, and with literally dozens of precedents to the contrary the Court suddenly in 1976 discovered that Eleventh Amendment immunity had been nullified by the Fourteenth Amendment.

Since *Fitzpatrick* acknowledges that the cases it cites as precedents did not involve the issue in dispute, it is perhaps unnecessary to make this case further. However, it may be useful to note just how weak a precedent these cases make. This Court in EX PARTE STATE OF VIRGINIA, 100 U.S. 339 (1879), ruled explicitly that the arrest of the state judge was not an interference in his duties as a state official:

> But if the selection of jurors could be considered in any case a judicial act, can the act charged against the petitioner be considered such when he acted outside of his authority and in direct violation of the spirit of the State statute? That statute gave him no authority, when selecting jurors, from whom a panel might be drawn for a circuit court, to exclude all colored men merely because they were colored. Such an exclusion was not left within the limits of his discretion. It is idle, therefore, to say that the act of Congress is

> unconstitutional because it inflicts penalties upon State judges for their judicial action. It does no such thing.

Appeal to *Katzenback* appears even more misplaced. That case was about the power of Congress to appoint the Justice Department to oversee state elections, and had nothing to do with private suits against states, nor was the Eleventh amendment ever mentioned in *Katzenback*.

Fitzpatrick is such a weak precedent that even after *Fitzpatrick*, this Court has hesitated to apply its doctrine. In QUERN v. JORDAN, 440 U.S. 332 (1979), then Justice Rehnquist writing for the majority rejected the Fourteenth Amendment challenge to sovereign immunity, noting:

> In Pugh the Court held, over three dissents, that the State of Alabama could not be joined as a defendant without violating the Eleventh Amendment, even though the complaint was based on 42 U.S.C. 1983 and the claim was a violation of the Eighth and Fourteenth Amendments similar to that made in Hutto. The Court said:
>
> > "There can be no doubt, however, that suit against the State and its Board of Corrections is barred by the Eleventh Amendment, unless Alabama has consented to the filing of such a suit. Edelman v. Jordan, 415 U.S. 651 (1974); Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945); Worcester County Trust Co. v. Riley, 302 U.S. 292 (1937)." 438 U.S., at 782.

Lacking, as it did any precedent for the action, and in fact, rejecting over a century of jurisprudence, there have been few times in history that the principle of *stare decisis* has been more flagrantly flouted than in *Fitzpatrick*.

The decision flouted not just *stare decisis*, but the most fundamental rules of legal interpretation. Two parts of the Constitution must both be given full effect unless they are clearly and irreconcilably contradictory.

As David Currie has written in a critique of *Fitzpatrick* this reasoning could just as well be applied to any part of the Constitution. Currie notes: "This reasoning is less than overwhelming. One might have thought that subsec. 5 [of the Fourteenth Amendment], like other 'plenary' grants of power, was subject to explicit and implicit constitutional limitations; one would hardly read it to empower Congress to authorize cruel and unusual punishment [for violators of the Fourteenth Amendment]."[2] In other words, if Congress now has power to overrule parts of the Constitution in order to protect constitutional rights which they claim to be protected by the Fourteenth Amendment, then they are able to proscribe cruel and unusual punishment or anything else they deem "appropriate" for such protection, even though otherwise explicitly prohibited by the Constitution.

In fact, such an interpretation is not without historical precedent. In *US v. CRUIKSHANK*, 92 U.S. 542 (1875), this Court noted that Congress had attempted to suspend the First, Second and Fifth Amendments to the Constitution under powers it claimed to possess from the Fourteenth Amendment. This Court, quite correctly ruled that whatever new powers Congress might claim under the reconstruction amendments, these powers could not be exercised in violation of explicit prohibitions found in other amendments.

II. Two parts of the Constitution must both be

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[2]David Currie, *The Constitution in the Supreme Court* (Chicago: University of Chicago Press, 1990), 573.

given force unless they are irreconcilably contradictory

Any argument that the Fourteenth Amendment actually overrules the Eleventh, must be based upon the claim that the two amendments are inherently contradictory.

It is a fundamental rule of interpretation that we must give full effect to all parts of the Constitution unless one clause is clearly incompatible with and contradictory to another. The Twenty-first amendment for example says that "The eighteenth article of amendment to the Constitution of the United States is hereby repealed." The Fourteenth Amendment contains no such provision. The Eleventh Amendment is quite explicit that "the Judicial power of the United States shall not be construed to extend to" suits against States. That statement is not contradictory of anything in the Fourteenth Amendment.

The fact that courts gave full force to both amendments for over 100 years is irrefutable evidence that the two amendments are not contradictory.

There is nothing incompatible with the Fourteenth Amendment prohibiting States from denying equal protection, and the Eleventh Amendment saying that if they do, it is not the role of the federal courts to make them.

As the plurality noted in *Ceour d'Alene v. Idaho* "It would be error coupled with irony were we to bypass the Eleventh Amendment, which enacts a scheme solicitous of the States, on the sole rationale that state courts are inadequate to enforce and interpret federal rights in every case."

This point seems eminently clear from an analysis of the relation of Article 1 section 10 and the Eleventh Amendment. Article 1 section 10, of course, provides a list of things which States are prohibited from doing: passing a "bill of attainder, ex post facto law, or law abridging freedom of contract" and so forth. In 1798 the Eleventh Amendment is ratified, and sovereign immunity is unquestionably enshrined in the Constitution. Does the Eleventh Amendment overrule and supersede art 1 sec 10? Can a State now pass a bill of attainder confiscating the property of a citizen of another State?

No one has ever argued that the Eleventh Amendment overruled Art 1 sec 10. Even the most diehard apologist for State's rights would not make such an argument. The assertion is preposterous. Even the most alarmist of anti-federalists never imagined that Article 1 sec 10 could be used to nullify sovereign immunity. As Alden declared, "The [Eleventh] Amendment's language, furthermore, was directed toward Article III, the only constitutional provision believed to call state sovereign immunity into question."

If a State in 1800 had attempted to make a law prohibited by Article 1, section 10, then it would have been unconstitutional, but any potential foreign citizen affected still would not have been able to bring suit against the State in federal court. He would need to bring suit in state court and demand that state judges rule the edict as a violation of the Constitution. It is entirely reasonable (and indeed our federal system was long built on the assumption) that some rights granted by the federal constitution are binding on a State, but that it is the responsibility of state courts – not federal ones – to guarantee it.

In *Couer d'Alene* the plurality opinion declared that "Neither in theory or in practice has it been shown

problematic to have federal claims resolved in State courts where Eleventh Amendment immunity would be applicable. . . Federal courts, after all, did not have general federal question jurisdiction until 1875." This position is echoed by the writing of Justice Harlan in *Young* that "If a suit be commenced in a state court, and involves a right secured by the Federal Constitution, the way is open under our incomparable judicial system to protect that right, first, by the judgment of the state court, and ultimately by the judgment of this court, upon writ of error."

If there is no necessary contradiction between Article 1 sec 10 and the Eleventh Amendment, as everyone will acknowledge. then there is also **no** reason to assume that there is a contradiction between the Eleventh and the Fourteenth Amendments. If there is no explicit contradiction then both parts must be given full force.

III. A state retains all of its sovereignty unless there is "specific and explicit cession" of that sovereignty.

Chisholm noted that "A state retains all of its sovereignty unless there is specific and explicit cession of that sovereignty." Certainly there is no "specific and explicit cession" of sovereign immunity found in the Fourteenth Amendment. Any attempt to find one is by implication or drawing on various "penumbras and emanations," but it is certainly not explicit.

We may also cite *Alden* (citing *Blatchford*) which postulated that "Congress may subject the States to private suits in their own courts only if there is 'compelling evidence' that the States were required to surrender this power to Congress pursuant to the constitutional design." By this standard there is no "compelling evidence" to suggest that the Framers of the Fourteenth Amendment meant to overrule the Eleventh amendment. Rather, precedents established by the Court show that **"each exists in full force** " (Young).

Moreover, even if one accepts that the Fourteenth

Amendment was designed to effect a "fundamental shift" in State/federal relations, the exact nature of that shift is still open to much debate. The assertion that denial of sovereign immunity was part of that shift is again based on nothing more than assumption and implication. To utterly nullify an entire article of the Constitution based on mere implication should not happen.

The Eleventh Amendment is "specific and explicit' about what the federal courts may not do. To overrule a specific and explicit prohibition by appeal to a mere guess and implication is contrary to every rule of legal interpretation. It is as if Congress were to enact a provision violating the explicit provisions of one part of the Constitution, while appealing to its "implied powers" as authority to do so. It would be the height of absurdity to imagine that Congress could set aside specific and explicit prohibitions based on an appeal to any "implied powers," yet this is precisely what people do who argue that Congress may ignore the explicit prohibition in Amendment 11, based on an 'implied power" found in Amendment 14.

To this effect we cite no less an authority on the subject than Alexander Hamilton, who in discussing sovereign immunity in Federalist 81, declared that "to ascribe to the federal courts, by mere implication, and in destruction of preexting right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarranted."

Since the view that Congress may subject States to suit under the Fourteenth amendment is "a mere implication" drawn from that article, it clearly runs afoul of the standard set by Hamilton, and the standards set down by this Court in *Chisholom*, *Batchford* and elsewhere.

IV. ADOPTING THE FOURTEENTH AMENDMENT CONGRESS DID NOT EXPRESS AN INTENTION TO ABROGATE THE ELEVENTH AMENDMENT.

In recent cases, this Court has ruled that "Congress

must express its intention to abrogate the Eleventh Amendment in unmistakable language" (ATASCADERO STATE HOSPITAL v. SCANLON, 473 U.S. 234 (1985)). While there are problems with this doctrine[3] it at least seems logical to apply this same standard to the Fourteenth Amendment itself. Does the Fourteenth Amendment contain "an unequivocal expression of congressional intent to overturn the constitutionally guaranteed immunity of the several States?'" (Pennhurst II, 465 U.S., at 99). We believe the answer to this question is clearly negative.

It is notoriously difficult to determine any legislative intent of the framers of the Fourteenth Amendment for the simple reason that there was no agreement even on such basic questions as who was a citizen. As Alfred Kelly has written of the Fourteenth Amendment debates, "Political strategy called for ambiguity, not clarity."[4] David Currie has noted that there were at least four different schools of thought on the meaning of the Amendment among its supporters (Op. Cit., 345). Despite this ambiguity, we must concur with the opinion of the Conference of Chief Justices who have written,

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[3] This doctrine stems from *Employees v. Missouri Health Dept* 411 US 279 (1973) which did not say that Congress could overrule Eleventh Amendment immunity so long as it explicitly said so (which is how it is often interpreted); but simply said no one can claim for Congress a power which Congress itself has not claimed: "It is not easy to infer that Congress in legislating pursuant to the Commerce Clause, which has grown to vast proportions in its applications, desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution."

[4] David Kelly, "Fourteenth Amendment Reconsidered," Michigan Law review, 54.8 (1956).

"We do not believe that either the framers of the original Constitution or the possibly somewhat less gifted draftsmen of the Fourteenth Amendment ever contemplated that the Supreme Court would, or should, have the almost unlimited policy making powers which it now exercises."[5]

In so far as the sovereign immunity issue was raised at all it was raised by opponents of the Fourteenth Amendment who argued that the wording went too far and would be used to attack state immunity. This interpretation, however, seems to have been rejected by Rep. Bingham (one of the principle authors) who argued that the amendment "takes from no State any right that ever pertained to it" (Cong. Globe, 39th Cong., 1st Sess. 2542-3). It was the opponents of the amendment who argued that it would radically alter the federal-state balance of power, and the supporters who argued that it would not.

The view that the Fourteenth Amendment was not a radical change in the constitutional set-up was not only shared by this Court at the time and for many years following, but was also followed by other authoritative interpretations at the time. For example, the Indiana Supreme Court when asked to rule on the effect of the Fourteenth Amendment immediately following its "ratification" ruled that "The Fourteenth Amendment contains no new grant of power from the people, who are the inherent possessors of all power, to the federal government, nor diminish those of the states" (The State v. Gibson, 36 Ind. 389) This was the common agreement of state supreme courts in the 1870's.[6]

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[5] Conference of Chief Justices, "Report of the Committee of Federal-State Relationships as Affected by Judicial Decisions," August 1958.

[6] See *We the States*, Virginia Commission on Constitutional Government, 1964.

Finally, even if the Fourteenth amendment was intended to significantly change the relationship of the state and federal governments, there is no reason to suppose that part of his change involved overruling the Eleventh amendment. As Justice Rehnquist has written most recently in this Court's opinion in *Quern v. Jordan*:

> There is no question that both the supporters and opponents of the Civil Rights Act of 1871 believed that the Act ceded to the Federal Government many important powers that previously had been considered to be within the exclusive province of the individual States. Many of the remarks from the legislative history of the Act quoted in MR. JUSTICE BRENNAN's opinion amply demonstrate this point. But neither logic, the circumstances surrounding the adoption of the Fourteenth Amendment, nor the legislative history of the 1871 Act compels, or even warrants, a leap from this proposition to the conclusion that Congress intended by the general language of the Act to overturn the constitutionally guaranteed immunity of the several States. . . . Given the importance of the States' traditional sovereign immunity, if in fact the Members of the 42d Congress believed that 1 of the 1871 Act overrode that immunity, surely there would have been lengthy debate on this point and it would have been paraded out by the opponents of the Act along with the other evils that they thought would result from the Act. Instead, 1 passed with only limited debate and not one Member of Congress mentioned the Eleventh Amendment or the direct financial consequences to the States of enacting 1. We can only conclude that this silence on the matter is itself a significant indication of the legislative intent of 1.

While these words are explicitly about the Civil Rights Act of 1871, they apply equally well to the Fourteenth Amendment itself. No one can seriously maintain that if Congress had intended to override the Eleventh Amendment in passing the Fourteenth amendment a few years earlier, that the radical

Republicans would not have invoked that power in passing the Act of 1871.

We could paraphrase *Employees v. Missouri Health Dept* and conclude: It is not easy to infer that Congress in passing the Fourteenth Amendment, which has grown to vast proportions in its applications, desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution.

V. Fitzpatrick Doctrine Contradicts Fundamental principles of federalism

The *Fitzpatrick* exception to state immunity is particularly disturbing, because the Eleventh Amendment is not a discreet and unrelated part of the Constitution, it is rather, part of the fundamental fabric of federalism. "That a state may not be sued without its consent is a fundamental rule of jurisprudence . . . of which the amendment is but an exemplification (IN RE NEW YORK, 256 U.S. 490 (1921)).

Moreover, as *Edelman* noted the queston of state immunity was one of the most central questions of the ratification debates:

> The right of the Federal Judiciary to summon a State as defendant and to adjudicate its rights and liabilities had been the subject of deep apprehension and of active debate at the time of the adoption of the Constitution; but the existence of any such right had been disclaimed by many of the most eminent advocates of the new Federal Government, and *it was largely owing to their successful dissipation of the fear of the existence of such Federal power that the Constitution was finally adopted.* (C. Warren, The Supreme Court in United States History 91) EDELMAN v. JORDAN, 415 U.S. 651 (1974).

This Court has repeatedly noted the importance of the doctrine of sovereign immunity, such as in ATASCADERO where this Court noted that:

> The "constitutionally mandated balance of power" between the States and the Federal Government was adopted by the Framers to ensure the protection of "our fundamental liberties." By guaranteeing the sovereign immunity of the States against suit in federal court, the Eleventh Amendment serves to maintain this balance

And as this Court recently noted in Alden v Maine:

> 'The principle of immunity from litigation assures the States and the nation from unanticipated intervention in the processes of government. " (Great Northern Life Ins. Co v. Read) When the States' immunity from private suits is disregarded, "'the course of their public policy and the administration of their public affairs" may become "'subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests." (In re Ayers) While the States have relinquished their immunity from suit in some special contexts--at least as a practical matter--this surrender carries with it substantial costs to the autonomy, the decisionmaking ability, and the sovereign capacity of the States. ... If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen.

In fact, statements by this Court as to the importance of state immunity in maintaining the independence of local government could well fill a book. Nowhere, perhaps, has the importance of this doctrine been more eloquently and forcefully set down than by Justice Harlan in his dissent against *Young* when he wrote that the denial of sovereign immunity

> if firmly established, would work a radical change in our governmental system. It would inaugurate a new era in the American judicial system and in the relations of the national and state governments. It would enable the subordinate Federal courts to supervise and control the official action of the states as if they were 'dependencies' or provinces. It would place the states of the Union in a condition of inferiority never dreamed of when the Constitution was adopted or when the Eleventh Amendment was made a part of the supreme law of the land.

CONCLUSION

In closing we cite this Court's decision in *Seminole Tribe of Florida v. Florida*, where Chief Justice Rehnquist wrote for the majority:

> [I]n the five years since it was decided, Union Gas has proven to be a solitary departure from established law. Reconsidering that decision, none of the policies underlying *stare decisis* require this Court's continuing adherence to its holding. The decision has been of questionable precedential value, largely because a majority of the Court expressly disagreed with the plurality's rationale. Moreover, the deeply fractured decision has created confusion among the lower courts that have sought to understand and apply it. The

> plurality's rationale also deviated sharply from this Court's established federalism jurisprudence and essentially eviscerated the Court's decision in Hans, since the plurality's conclusion - that Congress could under Article I expand the scope of the federal courts' Article III jurisdiction - contradicted the fundamental notion that Article III sets forth the exclusive catalog of permissible federal-court jurisdiction. Thus, Union Gas was wrongly decided and is overruled. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.

In the last several years, this Court has seen fit to overrule both *Union Gas* and *Parden* (*Parden* being a precedent much older than *Fitzpatrick*). This Court has found that both of those decisions were mere blips in an otherwise constant jurisprudence of upholding Eleventh Amendment immunity by this Court. The reasoning found in *Seminole Tribe* can just as accurately be applied to *Fitzpatrick*. The *Fitzpatrick* exception – and the rejection of the Art 3 requirement that in cases "in which a state shall be a party the Supreme Court shall have original jurisdiction" – has opened the door for local governments to be micromanaged by 1000 federal court judges, each claiming superiority over the entire people of the state.

As Justice Harlan wrote in his dissent in *Young*:

> If a suit be commenced in a state court, and involves a right secured by the Federal Constitution, the way is open under our incomparable judicial system to protect that right, first, by the judgment of the state court, and ultimately by the judgment of this court, upon writ of error.

And as Justice Kennedy wrote in the plurality opinion in *Coeur d'Alene*:

> It would be error coupled with irony were we to bypass the Eleventh Amendment, which enacts a scheme solicitous of the States, on the sole rationale that state courts are inadequate to enforce and interpret federal rights in every case.

It is time for a return to normalcy in this Court's Eleventh Amendment Jurisprudence. *Fitzpatrick* is a hold over from an activist period of this Court when the majority seemed to believe that local government could not be trusted with any independence and therefore had to be constantly monitored and controlled by unelected judges. That view is wrong and has been repudiated by the American people and by this Court in its recent decisions. There is now no reason to continue to adhere to the flawed and insupportable decision in *Fitzpatrick*. This Court should take the opportunity in the current case to explicitly overrule it.

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Appendix

Supreme Court Application of Fitzpatrick

A search in Findlaw resulted in the identification of a total of 32 Supreme Court cases which have cited Fitzpatrick v. Bitzer. A survey of these cases shows definitively that the Fitzpatrick doctrine (that Congress may abrogate the Eleventh Amendment immunity of the states under subsection 5 of the Fourteenth Amendment) has never been invoked in any other case. **Every time** which a plaintiff has argued that a State could be sued under a Fourteenth Amendment exception, the Court has ruled either that the issue involved was not covered by the Fourteenth Amendment, or that Congress had not made explicit provision for such a suit in the particular case.

Each of the 32 cases citing Fitzpatrick is summarized below.

1. Hutto v. Finney, 437 US 678 (1978): Issue: Attorney's Fees; Court ruled court awards of Attorney's fees was not barred by 11th Amendment because attorney's fees do "not compensate the plaintiff for injuries" and hence to do constitute a "suit against a State."

2. Maher v. Gagne, 448 US 122 (1980): Attorney's Fees.

3. Missouri v. Jenkins, 491 US 274 (1989): Issue: Attorney's Fees; Court rules "we also made clear [in Hutto and Maher] that the application of 1988 to the States did **not** depend on Congressional abrogation of States' immunity."

4. National League of Cities v. Usury, 426 US 833 (1976): Issue: Application of Federal Labor Standards Act (FLSA) to local governments; Court sided with cities, ruled cities not subject to FLSA.

5. Milliken v. Bradley, 433 US 267 (1977): Issue: school

desegregation; Court ruled that court order requiring school district to desegregate was not an Eleventh Amendment issue because it only required states to spend money which was already required by equal protection clause.

6. Monell v. New York City, 436 US 658 (1978): Issue: Suits against Local government: Court ruled local government protected from suit.

7. Quern v. Jordan, 440 US 332 (1979): Issue: Fourteenth Amendment; Court upheld state immunity in Fourteenth Amendment case ruling Congress did not make explicit intent to abrogate immunity.

8. New York Transit Authority v. Beazer, 440 US 568 (1979): Issue: suit against Local government; Court sided with city.

9. City of Rome v. US, 446 US 156 (1980): Issue: Federal Approval of voting districts; Eleventh amendment not an issue, private party not involved.

10. New York Gaslight Club v. Carey, 447 US 54 (1980) Issue: Suit between private parties, Immunity not at issue.

11. Owen v. City of Independence, 445 US 622 (1980): Issue: Ex parte Young type of suit against city.

12. Fullilove v. Klutznick, 448 US 448 (1980): Issue: Upheld federal statute requiring 10% of federal grant money to be used for minority business. Court ruled was a spending discretion case not Eleventh Amendment case.

13. Florida Dept of Health v. Florida Nursing Home, 450 US 147 (1981); Issue: Suit against State; Court reversed lower court ruling and refused to permit suit against Florida.

14. Pennhurst State School v. Halderman (Pennhurst 1) 451 US 1 (1981); Issue: Fourteenth Amendment: Court reversed lower court ruling and refused to permit suit against state by mentally retarded under Fourteenth Amendment.

15. Hodel v. Virginia Mining Association, 452 US 264 (1981); Issue: Court sided with State and struck down Surface Mining Control Act.

16. Patsy v. Florida Board of Regents, 457 US 496 (1982): Issue: Whether state remedies must be exhausted before filing suit in federal Court; Eleventh Amendment not at issue.

17. Florida Dept of State v. Treasure Salvors, 458 US 670 (1982): Interstate property dispute; Eleventh Amendment not at issue.

18. Hensley v. Eckerhart, 461 US 424 (1983): Issue: Suit against State: Court sided with Missouri.

19. EEOC v. Wyoming, 501 US 722 (1991): Issue: Commerce Clause regulation of States.

20. Pennhurst State School v. Halderman (Pennhurst 2), 465 US 89 (1984): Issue: Court ruled in favor of State found that suit prohibited by Eleventh Amendment.

21. Atascadero State Hospital v. Scanlon, 473 US 234 (1985): Fourteenth Amendment case: Court ruled States could not be sued under Civil Rights Act of 1964 since Congress had not expresses clear intent to abrogate sovereign immunity.

22. Welch v. Texas Highways Dept., 483 US 468 (1987): Issue: Court upheld State immunity from prosecution by employee.

23. Pennsylvania v. Union Gas, 491 US 1 (1989); Issue: Suits against States based on Commerce clause; overturned..

24. Will v. Michigan State Police, 491 US 58 (1989): Issue: Court sided with State ruled State could not be sued under statute invoked.

25. Delmuth v. Muth, 491 US 223, (1989); Issue: suits against states; Court ruled suits against states not permitted by Education of Handicapped Act, due to state immunity.

26. Blatchford v. Native Village of Noatak, 501 US 775 (1991); Issue suit against tribal government; Court reversed lower court ruling and refused to permit suit against village.

27. Gregory v. Ashcroft 501 US 452 (1991): Issue: Age Discrimination; Court sided with States.

28. Coleman v. Thompson, 501 US 722 (1991): Issue: Court sided with state and refused to permit suit, but 11th Amendment not at issue.

29. Hess v. Port Authority Trans Hudson Corp, (1994) Issue: Court Ruled Port Authority was a private corporation and not a division of any state even though seed money provided by New York and New Jersey.

30. Seminole Tribe v. Florida (1996): Court overturned earlier decision allowing Congress to abrogate State immunity under interstate commerce.

31. Idaho v. Coeur d'Alene Tribe (1997): Issue: Fourteenth Amendment; Court sided with state refused to permit suit.

32. City of Boerne v. Flores (1997): Issue: Rel. Freedom Rest. Act: Court sided with city, struck down RFRA.

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No. 99-1240

IN THE

Supreme Court of the United States

THE UNIVERSITY OF ALABAMA AT BIRMINGHAM, BOARD OF TRUSTEES, ET AL.,
Petitioners,

v.

PATRICIA GARRETT AND MILTON ASH,
Respondents.

On Writ of Certiorari
To The United States Court of Appeals
for the Eleventh Circuit

BRIEF OF AMICI CURIAE STATES OF HAWAII, ARKANSAS, IDAHO, NEBRASKA, NEVADA, OHIO, AND TENNESSEE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE

Through the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* (hereinafter ADA or the Act), Congress has "obliterat[ed] the Framers' carefully crafted balance of power between the States and the National Government." *United States* v. *Morrison*, 120 S. Ct. 1740, 1755 (2000) (citation omitted). It is for this reason that the States of Hawaii, Arkansas, Idaho, Nebraska, Nevada, Ohio, and Tennessee urge the Court to reverse the judgment below. In so doing, they join the State of Alabama in this case and at least two other States that have independently requested that the Court protect the immunity of the States from suit under the ADA. *See Brown* v. *North Carolina Div. of Motor Vehicles*, 166 F.3d 698 (4th Cir. 1999), *petition for cert. pending* (No. 99-424); *Dare* v. *California*, 191 F.3d 1167 (9th Cir. 1999), *petition for cert. pending* (No. 99-1417).

The issue presented is whether Congress has the power under Section Five of the Fourteenth Amendment to abrogate the States' Eleventh Amendment immunity to impose liability under the ADA against States for suits brought by private citizens in federal courts. The constitutional rights of the States are being violated by the ADA. The ADA has in effect relegated States to the status of governmental provinces in our federal system of government on matters pertaining to discrimination against the disabled, and it has done so without any justification in the form of prior misconduct by the States, and without any tailoring of the federal remedy to the scope of supposed State misconduct. The broad sweep of the ADA reaches into all State programs and services, including those most sensitive to the States, affecting prisons and hospitals, delivery of medical insurance to the poor under Medicaid laws, and quarantine systems designed to protect a State from the importation of rabies. Under the limited defenses provided by the ADA, neither a rational basis nor even a compelling state interest generally suffices to protect a State from liability. Nor is a State's good faith, nor even its motivation to protect the disabled, a defense to monetary

damage claims under the ADA. By its terms, and as interpreted by the federal courts, none of these "defenses" is available to the States.

Amici share with all States an interest in protecting their sovereignty from such unwarranted intrusion by Congress. The States "are not relegated to the role of mere provinces or political corporations but retain the dignity . . . of sovereignty." *Alden* v. *Maine*, 527 U.S. 706, 715 (1999). This sovereignty requires that States may not, without their consent, be subject to private suit in federal court except where Congress acts pursuant to a grant of valid authority under the Constitution. *Kimel* v. *Florida Bd. of Regents*, 120 S. Ct. 631 (2000).

In the last several Terms, this Court has four times considered whether a statute was enacted by Congress pursuant to a grant of power under the Fourteenth Amendment sufficient to abrogate the States' Eleventh Amendment immunity. In each of those cases, this Court concluded that Congress had inappropriately sought to redefine the substance of the constitutional right at issue, rather than validly seeking to enforce or prevent violations of the Fourteenth Amendment. *See Kimel*, 120 S. Ct. 631; *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank,* 527 U.S. 627 (1999); *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). In addition to providing powerful precedent for why applying the ADA to the States in federal court exceeds Congress' authority, this recent history also exhibits that the States must remain ever vigilant to guard against encroachment by the Federal Government of their sovereign power.

In filing this brief, *Amici* do not seek to limit the ability of the disabled to protect their rights. To the contrary, the States have long been at the forefront of efforts to prohibit discrimination against the disabled and to eliminate barriers to their full participation in society. Any State may consent to be sued in federal court for enforcement of the ADA. But our

federalist design requires that the States, and not the Federal Government, be the arbiters of when that consent will be given.

SUMMARY OF ARGUMENT

Last Term, in *Kimel* v. *Florida Board of Regents*, 120 S. Ct. 631 (2000), this Court held that Congress lacked the power under Section Five of the Fourteenth Amendment to impose liability against unconsenting States in federal court for violations of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA"). In *Kimel*, this Court held that the ADEA "prohibits very little conduct likely to be held unconstitutional," and was based on a legislative record in which "Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation." 120 S. Ct. at 648, 649. The parallels between the ADA, at issue here, and the ADEA are striking, and lead to the conclusion that in enacting the ADA, Congress similarly lacked the power under the Fourteenth Amendment to abrogate the Eleventh Amendment immunity of the States.

When it considered the ADA, Congress did not have before it evidence of a pervasive pattern of violations by the States of the constitutional rights of the disabled. While Congress identified a record of wide-spread discrimination against the disabled in society generally, it failed to find a pattern of conduct by the States in violation of the rights of their disabled residents, no less find any such violations that would amount to a constitutional violation. To the contrary, States have historically protected the interests of the disabled through the provisions of state law, and Congress looked to what had been done by the States as examples of steps that could be taken to better integrate the disabled into society. In addition, the provisions of the ADA cannot be understood as designed to remedy or prevent violations of the constitutional rights of the disabled because the provisions of the ADA are well out of proportion to the rights of the disabled as protected by the Fourteenth Amendment. In *City of Cleburne* v.

Cleburne Living Center, Inc., 473 U.S. 432 (1985), this Court held that distinctions drawn by the States on the basis of disability are afforded only rational basis review under the Fourteenth Amendment, a holding that was affirmed by the Court in *Heller* v. *Doe*, 509 U.S. 312 (1993). In contrast to review under the rational basis test, which presumes governmental classifications to be lawful and accepts a rational explanation by the State for classifications on the basis of disability, the ADA prohibits a much broader swath of conduct by the States. The legislative history confirms that Congress, through the ADA, was attempting precisely to increase the level of scrutiny given to classifications concerning the disabled as compared to that applied under the Equal Protection Clause. In sum, the ADA, like the ADEA and the Religious Freedom Restoration Act previously considered by this Court, "is 'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.'" *Kimel*, 120 S. Ct. at 647 (quoting *City of Boerne*, 521 U.S. at 532).

Amici have far more than an academic interest in these matters. Litigation brought under the ADA against the States provides concrete evidence of the lack of congruence and proportionality between the requirements of the ADA and the strictures of the Equal Protection Clause. These cases exhibit how the ADA requires States to defend themselves in federal court, and sometimes to pay damages awards, where laws or practices of general applicability have an incidental effect on the disabled. Under the ADA, States have been held liable for their very attempts to comply with the Act. States would not be held liable – or likely even face litigation – for such conduct under the Equal Protection Clause. The United States does not face the threat of compensatory damages for its discrimination against the disabled because the ADA does not apply to the federal government, *see* 42 U.S.C. § 12111(5)(B), 42 U.S.C. § 12131, and the Rehabilitation Act, which prohibits discrimination against the disabled by the federal government, does not authorize awards of com-

pensatory damages in actions against the United States. *Lane* v. *Pena*, 518 U.S. 187 (1996).

The interest of *Amici* in protecting their sovereignty, however, should not be mistaken for an interest in limiting the rights of their disabled residents. To the contrary, *Amici* intend to continue their efforts to ensure that the disabled are not discriminated against and are able to participate fully in society. Through state law protections, and through the ADA where States consent to private suit in federal court, the interests of the disabled will continue to be protected from unwarranted discrimination by the States even were this Court to conclude – as it should – that in enacting the ADA, Congress lacked the power under the Fourteenth Amendment to abrogate the States' Eleventh Amendment immunity.

ARGUMENT

I. THE ELEVENTH AMENDMENT BARS SUITS UNDER THE ADA BY PRIVATE CITIZENS IN FEDERAL COURT AGAINST NON-CONSENTING STATES

Although the Constitution provides the Federal Government with broad powers over areas within its competence, it also specifically "recognizes the States as sovereign entities." *Alden* v. *Maine*, 527 U.S. at 517 (quoting *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 71 n.15 (1996)). The immunity of non-consenting States from suit by private citizens in federal court – reflected in the Eleventh Amendment to the Constitution – is central to the sovereignty retained by the States.[1] "[F]or over a century now, we have made clear that the Constitution does not provide for federal jurisdiction over

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[1] The Eleventh Amendment to the Constitution states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

suits against nonconsenting States." *Kimel*, 120 S. Ct. at 640 (citing *College Sav. Bank*, 527 U.S. at 713; *Seminole Tribe*, 517 U.S. at 54; *Hans* v. *Louisiana*, 134 U.S. 1, 15 (1890)). For Congress to abrogate the States' Eleventh Amendment immunity it must make its intent to abrogate unambiguous in the text of the statute itself,[2] and must act pursuant to a valid grant of constitutional authority. *Kimel*, 120 S. Ct. at 640.

In enacting the ADA, Congress expressly relied on its power under the Fourteenth Amendment. *See* 42 U.S.C. § 12101(b)(4).[3] While the affirmative grant of power to Congress contained in the Fourteenth Amendment provides Congress with the power to abrogate the Eleventh Amendment immunity of the States, that power is not unlimited. *Kimel*, 120 S. Ct. at 644. Congress retains the power to enforce the provisions of the Fourteenth Amendment, but lacks the power to decree the substance of those provisions. *Id.* (citing *City of Boerne*, 521 U.S. at 519). Legislation that properly enforces the Fourteenth Amendment rather than redefining its substance exhibits "'a congruence and proportionality between the injury to be prevented or remedied and

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[2] The ADA contains an unambiguous expression by Congress of an intent to abrogate the States' immunity. *See* 42 U.S.C. § 12202.

[3] The Fourteenth Amendment to the Constitution provides in relevant part:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . . . . .
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

the means adopted to that end.'" *Id.* (quoting *City of Boerne*, 521 U.S. at 520).

In applying the congruence and proportionality test, two areas of inquiry have emerged. The first is whether the record developed by Congress contains evidence of unconstitutional conduct purportedly targeted by the legislation. Where there is no more than "anecdotal evidence" that does not reveal a "widespread pattern" of constitutional violations across the country, the legislative record does not support a conclusion that Congress was acting prophylactically to remedy or avoid constitutional violations. *City of Boerne*, 521 U.S. at 531. In order to support abrogation of the States' Eleventh Amendment immunity, moreover, the legislative record must manifest more than just a general problem in society at large, it must contain evidence of constitutional violations of the right at issue *by the States*. *Florida Prepaid*, 527 U.S. at 640.

The second inquiry is whether the legislation at issue is proportional to a supposed remedial or preventive purpose. Relevant to this inquiry is the likelihood that the conduct by the States prohibited by the legislation in question would be found to violate the applicable constitutional standard. Thus in *City of Boerne*, this Court held that the Religious Freedom Restoration Act ("RFRA") was not proportional remedial legislation because the compelling state interest test RFRA imposed was likely to displace many state laws that would survive the governing standard developed by this Court. *City of Boerne*, 521 U.S. at 532-34. In *Kimel*, this Court held that the ADEA was not a proportional response to any conceivable constitutional problem because it "prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard." *Kimel*, 120 S. Ct. at 647; *see Florida Prepaid* 527 U.S. at 646-47; *College Sav. Bank*, 527 U.S. at 672-74.

Applying the congruence and proportionality test to the ADA leads to the same conclusion reached by this Court in

City of Boerne, *Kimel*, *Florida Prepaid*, and *College Savings Bank*. The ADA is not congruent or proportional to any purported constitutional violations by the States of the rights of the disabled. Congress enacted the ADA without evidence of any unconstitutional discrimination by the States against the disabled, no less a widespread pattern of such violations. The ADA is also disproportionate because it prohibits substantially more State conduct concerning the disabled than would likely be held unconstitutional under the applicable equal protection, rational basis standard. In fact, the legislative history of the ADA shows that Congress expressly intended to heighten the level of scrutiny provided to decisions concerning the disabled above that required by the Constitution.

A. The Legislative History of the ADA Provides No Evidence of a Pattern of Misconduct by the States In Violation of the Constitutional Rights of the Disabled

The ADA resulted from extensive factual findings by Congress. The text of the ADA itself begins with "Congressional Findings and Purposes," in which Congress makes nine different findings concerning the discrimination, isolation, and segregation faced by the disabled. 42 U.S.C. § 12101. Not one of these findings, however, so much as mentions any misconduct by the States concerning their disabled residents, nor identifies any conduct that rises to the level of violating the constitutional rights of the disabled.

The impressive legislative record gathered by Congress in enacting the ADA also fails to identify the States' treatment of the disabled as an area of concern. In the many committee hearings, reports, and debates concerning the ADA, Congress did not focus on the conduct of States, but instead found that the disabled faced discrimination, prejudicial treatment, and barriers to full participation in society generally.[4] Congress

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[4] *See generally* House Comm. on Ed. and Labor, 101st Cong. 2nd Sess., *Legislative History of Public Law No. 101-336, The*

did not, however, "identif[y] any pattern of [disability] discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation." *Kimel*, 120 S. Ct. at 649.

Even with regard to the sections of the ADA most closely related to conduct by the States, the legislative record fails to reflect evidence of discriminatory – no less unconstitutional – conduct by the States concerning the disabled. Congress explained that Title II.A of the ADA, 42 U.S.C. §§ 12131-34 – which prohibits discrimination in the delivery of public services by State and local governments – was an extension of the non-discrimination provisions of the Rehabilitation Act, 29 U.S.C. § 701 *et seq.*, which prohibits discrimination against the disabled by entities receiving federal funds. Congress noted that Title II.A was necessary because "[t]he resulting inconsistent treatment of people with disabilities by different State or local governmental agencies is both inequitable and illogical."[5] But in making this observation,

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Americans With Disabilities Act (Comm. Print 1990) (hereinafter "*Comm. Print*"). This Committee Print is a compilation of documents pertaining to the legislative history of the ADA.

In considering the ADA, Congress was presented evidence of general differential treatment of the disabled in areas in which States do not have a primary, or leading, role such as: transportation, *see, e.g.*, *Comm. Print* at 144-55, 170-74 (S. Rep. No. 101-116) (Comm. on Labor and Human Resources), 234-52 (H. Rep. No. 101-485, Part 1) (Comm. on Pub. Works and Transportation); public accommodations and services offered by private entities, *see, e.g.*, *id.* at 156-70 (S. Rep. No. 101-116), 307-10 (H. Rep. No. 101-485, Part 2) (Comm. on Ed. and Labor); telecommunications, *see, e.g.*, *id.* at 175-81 (S. Rep. No. 101-116), 561-64, 599-603 (H. Rep. No. 101-485, Part 4) (Comm. on Energy and Commerce); and employment, *see, e.g.*, *id.* at 122-42 (S. Rep. No. 101-116), 327-56 (H. Rep. No. 101-485, Part 2) (Comm. on Ed. and Labor), 471-89 (H. Rep. No. 101-485, Part 3) (Comm. on Judiciary).

[5] *Comm. Print* at 310 (H. Rep. No. 101-485, Part 1) (Comm. on Ed. and Labor); *see id.* at 110 (S. Rep. No. 101-116) (noting that

Congress did not identify any such inconsistent treatment by different governmental entities, nor did it identify any pattern of State conduct in violation of the protections contained in the Rehabilitation Act. Indeed, the Rehabilitation Act was repeatedly cited by supporters of the ADA as a model for the ADA itself.[6]

The legislative history concerning the enactment of the portion of the ADA that purports to abrogate the States' Eleventh Amendment immunity, 42 U.S.C. § 12202, is similarly silent concerning any pattern of illegal or unconstitutional conduct by the States. The legislative record concerning this provision simply recites that it was "included in order to comply with the standards for covering states set forth in *Atascadero State Hospital* v. *Scanlon* [473 U.S. 234 (1985)]."[7] Congress identified no evidence of State conduct making such abrogation necessary.

To the extent that States are mentioned at all in the legislative record, they are generally held up as positive examples for actions they had already taken to protect the rights of the disabled. Witnesses testified before Congress that virtually every State had enacted some form of legislation protecting the disabled from discrimination,[8] and provided details

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"[w]itnesses testified about the inequity of limiting protection based on the receipt of Federal funding.").

[6] *See, e.g.*, *Comm. Print* at 490-91 (H. Rep. No. 101-485, Part 3) (Comm. on Judiciary); 625 (May 17, 1990 floor remarks of Rep. Weiss).

[7] *Comm. Print* at 184 (S. Rep. No. 101-116); 411 (H. Rep. No. 101-485, Part 2) (Comm. on Ed. and Labor).

[8] *See Comm. Print* at 190 (S. Rep. No. 101-116) ("All states currently mandate accessibility in newly constructed state-owned public buildings . . . "); *id.* at 194 (S. Rep. No. 101-116, views of Sen. Hatch) (referring to the "growing array of programs and antidiscrimination provisions at the local [and] state . . . levels"); *id.* at 2179 (testimony of Robert L. Burgdorf, Jr.) ("A number of states have passed legislation mandating accessibility in their park

concerning the efforts of individual States on behalf of their disabled residents.[9]

The legislative history further lacks any substantial discussion of the constitutional rights of the disabled and whether the States were violating those rights. There is virtually nothing in the legislative history concerning the requirements of the Constitution. The issue was not addressed even by those witnesses who would presumably be most knowledgeable about it.[10] It appears that only one witness even mentioned the governing law from this Court concerning the constitutional rights of the disabled. That law was mentioned, however, not as evidence that the States had frequently violated the relevant constitutional standard, but rather to argue that the Equal Protection Clause failed, in the witness' view, to adequately protect the rights of the disabled. As this witness noted, the Court has:

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and recreation facilities."); *see also* Appendix A hereto (listing current state laws).

[9] *See, e.g., Comm. Print* at 623 (remarks of Rep. Unsoeld concerning Washington); *id.* at 1046-61 (testimony of Massachusetts officials); *id.* at 1552 (testimony of EEOC Commissioner Kemp concerning North Carolina and Oregon); *id.* at 2845 (testimony of James Gashel concerning California); *To Establish a Clear and Comprehensive Prohibition of Discrimination on the Basis of Disability: Hearings on S. 933 before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources*, 101st Cong., 1st Sess. 75-85 (hereinafter "*Hearings on S. 933*") (statement of Illinois Attorney General Neil Hartigan).

[10] *See, e.g., Hearings on S. 933* at 38-40, 299-337, 427-39 (testimony and statement of Arlene Mayerson, Directing Attorney, Disability Rights Education and Defense Fund); *id.* at 75-85, 487-93 (testimony and statement of N. Hartigan); *id.* at 169-71, 753-73 (testimony and statement of Tim Cook, Executive Dir. of the National Disability Action Center); *id.* at 195-214, 808-20, 829-46 (testimony and statements of Attorney General Thornburgh); *id.* at 590-611 (statement of American Civil Liberties Union).

> consigned cases involving disability discrimination to the level or 'tier' of judicial scrutiny least favorable to the individual who suffers the discrimination – the so-called 'rational basis' test. *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432 (1985). What this means in practical terms is that any halfway plausible rationalization for governmental discrimination against people with mental or physical disabilities will be enough to satisfy the Federal courts.[11]

Far from providing evidence of a pattern of violations of the constitutional rights of the disabled, this statement merely reinforces that through the ADA Congress sought to redefine the level of protection provided to the disabled pursuant to the Equal Protection Clause.

A review of the ADA's legislative record thus reveals that Congress "had virtually no reason to believe that State . . . governments were unconstitutionally discriminating" against their citizens on the basis of disability, *Kimel*, 120 S. Ct. at 650, and fails to support any notion that in enacting the ADA, Congress was addressing a nationwide problem of discrimination by the States against the disabled.

B. Because the ADA Imposes a Significantly Higher Burden on the States than Does Rational Basis Scrutiny, the Provisions of the ADA Cannot Be Understood as a Response to, or as a Means to Prevent, Unconstitutional Discrimination Against the Disabled

In addition to being based on a legislative record that lacks evidence of discriminatory conduct by the States, the ADA also forbids significantly more state conduct concerning the disabled than is prohibited by the Fourteenth Amendment. Distinctions drawn by States on the basis of disability are

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[11] *Comm. Print* at 2246 (statement of James W. Ellis, President, American Association on Mental Retardation).

judged for purposes of equal protection analysis by the rational basis test. *Heller* v. *Doe*, 509 U.S. at 319-21; *City of Cleburne*, 473 U.S. at 439-42. The requirements of the ADA, however, effectively raise the level of scrutiny applied to State actions with regard to the disabled to a level well above that required by rational basis review. This is no surprise, because the legislative record makes clear that in enacting the ADA, Congress expressly intended to redefine the substantive Fourteenth Amendment protections provided to the disabled.

Title I of the ADA prohibits employers (including, by its terms, State employers) from discriminating on the basis of disability in hiring, compensation, advancement, training and other "terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). "Discrimination" as defined by Title I of the ADA includes not only purposeful discrimination, but also the use of "standards, criteria, or methods of administration . . . that have the *effect* of discrimination." 42 U.S.C. § 12112(b)(3)(A)(emphasis added). Title I requires an employer to make a "reasonable accommodation"[12] to the known physical or mental limitations of an applicant or employee unless the employer demonstrates that the accommodation would impose an "undue hardship." 42 U.S.C. § 12112(b)(5)(A); *see* 42 U.S.C. § 12111(10) (defining "undue hardship").[13] Remedies available for violations of

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[12] The ADA defines reasonable accommodations to include, among other things, making alterations to existing physical facilities, offering part-time or modified work schedules, and providing qualified readers or interpreters. 42 U.S.C. § 12111(9)(A),(B).

[13] Title I also limits the extent to which applicants and employees may be subjected to medical examinations, and the uses that may be made of such information. 42 U.S.C. § 12112(d). Title I further prohibits employers from using standards, tests, or other selection criteria "that screen out or tend to screen out an individual with a disability" unless that standard, test, or criteria is shown by the employer "to be job-related for the position in question and is consistent with business necessity." 42 U.S.C. § 12112(b)(6).

Title I of the ADA are the same as those available for violations of Title VII of the Civil Rights Act of 1964. *See* 42 U.S.C. § 12117(a).

Title II of the ADA protects the disabled from being discriminated against, or excluded from participation in, services, programs or activities of a public entity. 42 U.S.C. § 12132. A "[q]ualified individual with a disability" under Title II is someone who meets the "essential eligibility requirements" for participation in the public service, program, or activity with or without "reasonable modifications," "the removal of architectural, communication, or transportation barriers," or the "provision of auxiliary aids and services." 42 U.S.C. § 12131. The remedies available for violations of Title II are those provided by Title VI of the Civil Rights Act of 1964.[14]

As even this brief synopsis[15] shows, the ADA prohibits a far broader range of conduct than that prohibited under the rational basis test of the Equal Protection Clause. In *City of Cleburne*, this Court expressly rejected the notion that the disabled constitute a suspect or quasi-suspect class. 473 U.S. at 442-47. Because States "may legitimately take into account [characteristics of the disabled] in a wide range of decisions," the rational basis standard is appropriate to provide States with "the latitude necessary both to pursue policies designed to assist the [disabled] in realizing their full potential, and to freely and efficiently engage in activities that burden the [disabled] in what is essentially an incidental manner." *Id.* at 446. Under the Equal Protection Clause, a

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[14] The ADA itself provides that remedies for violations of Title II are those provided in section 505 of the Rehabilitation Act, 29 U.S.C. § 794a. *See* 42 U.S.C. § 12133. Section 505 of the Rehabilitation Act in turn refers to the remedies provided by Title VI of the Civil Rights Act. 29 U.S.C. § 794a.

[15] Additional explanation of the discrimination prohibited by the ADA is contained in regulations promulgated by the Department of Justice. *See* 28 C.F.R. § 35.101 *et seq.*

classification made by the States on the basis of disability is "presumed to be valid" and will be sustained if it is "rationally related to a legitimate state interest." *Id.* at 440. To show a violation of the Equal Protection Clause, it is insufficient to show that a neutral classification has a disparate impact, instead it is necessary to show intentional discrimination. *See, e.g., Washington* v. *Davis*, 426 U.S. 229 (1976); *Personnel Admin.* v. *Feeney*, 442 U.S. 256 (1979).

In contrast, in an employment context the ADA makes unlawful all "discriminat[ion] against a qualified individual with a disability because of the disability" of that individual, regardless of whether the employer had a rational basis for its actions. 42 U.S.C. § 12112(a); *see Kimel*, 120 S. Ct. at 647 (describing virtually identical provision of ADEA). Moreover, the ADA requires employers to make reasonable accommodations for disabled employees unless the employer can show that such an accommodation would pose an undue hardship. Similarly, under Title II of the ADA, a State may not impose a criteria that "tend[s] to screen out" a qualified disabled individual from a State program, regardless of the rationality of that criteria, unless the State can show that the criteria is necessary for the provision of the program. 28 C.F.R. § 35.130(b)(8). These requirements are backwards of the rational basis scrutiny under the Equal Protection Clause, which presumes State classifications to be proper, and where the burden always remains on the plaintiff to show intentional discrimination. *See Erickson* v. *Board of Governors*, 207 F. 3d 945, 951 (7th Cir. 2000) ("*no one* believes that the Equal Protection Clause establishes the disparate-impact and mandatory-accommodation rules found in the ADA") (emphasis in original). In sum, the ADA "through its broad restriction on the use of [disability] as a discriminating factor, prohibits substantially more State . . . decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard." *Kimel*, 120 S. Ct. at 647.

Of course, Congress may, in order to deter constitutional violations, prohibit conduct that reaches more broadly than that which actually violates the Constitution. "Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional." *City of Boerne*, 521 U.S. at 532 (citing *City of Rome* v. *United States*, 446 U.S. 156, 177 (1980)). But in enacting the ADA, Congress was not faced with conduct by the States evidencing a pattern of violations of the constitutional rights of the disabled. Therefore, the "[s]weeping coverage [of the ADA which] ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter" is a means plainly disproportionate to any proper constitutional end. *City of Boerne*, 521 U.S. at 532.

C. By Patterning the ADA on Civil Rights Legislation Concerning Discrimination on the Basis of Race and Gender, Congress Expressly Intended to Heighten the Level of Scrutiny Provided to Classifications on the Basis of Disability

The legislative history of the ADA itself shows that rather than attempting to deter constitutional violations, Congress' goal was to heighten the level of scrutiny applied to decisions affecting the disabled above that provided by the rational basis test. Congress consciously modeled the ADA on earlier civil rights laws dealing with race and gender discrimination, and explicitly provided that discrimination against the disabled under the ADA would be subjected to the same heightened scrutiny.[16] The purpose of the ADA, explained

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[16] *See, e.g., Comm. Print* at 71, 85 (H. Conf. Rep. No. 101-596); *id.* at 100, 123, 142 (S. Rep. No. 101-116); *see also id.* at 2015 ("The Americans with Disabilities Act wisely parallels in the disability area title VII of the Civil Rights Act of 1964, the landmark statute that prohibits discrimination in employment on

the House Judiciary Committee, in rejecting one proposed amendment "antithetical" to that purpose, was "to provide civil rights protections for persons with disabilities that are parallel to those available to minorities and women." [17] While purporting to impose this far-reaching liability on the States for discrimination against the disabled, Congress exempted the federal government from the requirements of the ADA. *See* 42 U.S.C. § 12111(5)(B) (United States specifically excluded from definition of an employer); 42 U.S.C. § 12131 (United States not included in definition of "public entity").[18]

There is accordingly no mystery concerning Congress' intent in enacting the ADA. Rather than attempting to remedy or prevent constitutional violations of the rights of the disabled, Congress explicitly sought to enhance the protections provided the disabled by changing the level of scrutiny this Court had held was applicable to such decisions made by the States. This Congress may not do. *City of Boerne,* 521 U.S. at 535-36; *Kimel*, 120 S. Ct. at 644 ("The ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch.").

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the basis of race, color, national origin, sex, or religion.") (statement of Attorney General Thornburgh).

[17] *Comm. Print* at 488-89 (H. Rep. No. 101-485, Part 3) (Comm. on Judiciary); *see id.* (adopting another amendment "because it reaffirms the intent of parity between people with disabilities and minorities and women"). According to the House Judiciary Committee, the ADA "completes the circle . . . with respect to persons with disabilities by extending to them the same civil rights protections provided to women and minorities beginning in 1964." *Id.* at 466.

[18] Moreover, the Rehabilitation Act, which prohibits discrimination against the disabled by the federal government, does not authorize awards of compensatory damages in actions against the United States. *Lane* v. *Pena*, 518 U.S. 187 (1996).

II. LITIGATION AGAINST THE STATES ILLUSTRATES THE ADA'S LACK OF CONGRUENCE AND PROPORTIONALITY TO CONSTITUTIONAL STANDARDS

Amici's concern with the reach of the ADA is far from academic. Across the country, States face litigation in federal court in which they must defend, under the ADA, actions with regard to the disabled which are perfectly lawful under the Equal Protection Clause. The cases below show, in concrete terms, the lack of congruence and proportionality between the requirements of the ADA on the one hand, and the requirements of the Constitution on the other. By discussing only several of these cases, it should not be inferred that they are the only ones that offend the sovereign interests of the States. Every suit by a private citizen in federal court against an unconsenting State under the ADA does harm to State sovereignty by forcing the State to spend time and resources to justify actions that should be presumed legal pursuant to applicable constitutional standards and evaluated only under the rational basis test. Every suit brought under the ADA diverts State resources into litigation costs – and damages awards where such damages are awarded – that could instead be used to provide services to the disabled and to other citizens of the State. In addition, litigation under the ADA discourages the States from pursuing initiatives to provide and expand core services to their vulnerable populations, and rewards such efforts with private lawsuits costing millions of dollars.

Amici's interest in defending the structural protections contained in the Constitution must not be confused with a disregard for the rights of the disabled. Activities by the States to protect the rights of their disabled residents were lauded by Congress as examples of what could be done more broadly through the ADA. Today, discrimination against the disabled is prohibited by means of state law which, in every State, protects the disabled from discrimination.[19] In addi-

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19 *See* Appendix A attached listing State laws that protect the rights of the disabled.

tion, any State may, if it chooses, waive its immunity and consent to suit in federal court on claims brought under the ADA. But our constitutional design requires that those decisions be made by the States themselves. And the Constitution further provides that this Court is to be the final arbiter of the substance of the rights protected by the Constitution. Where Congress oversteps those constitutional boundaries, as it has in purporting to hold States liable under the ADA, the States must act to restore the proper Constitutional balance.

A. Hawaii's Good Faith Attempt to Expand Medicaid Coverage to its Needy Uninsured Population Has Resulted in Two Class Action Lawsuits Under the ADA Imposing Liability for Potentially Millions of Dollars, and the Loss of Medical Coverage to Over 30,000 Needy Residents

Hawaii's experience with the ADA illustrates the axiom that "no good deed goes unpunished," while clearly demonstrating the burdens the ADA imposes, and its intrusiveness into areas traditionally reserved to the States. Perhaps nothing is more important to the States than protecting the health and welfare of their residents. In 1993, Hawaii was a pioneer in efforts to determine whether States could provide Medicaid coverage to a broader class of needy citizens while using the same amount of funds. Hawaii sought to provide universal health insurance for its residents by loosening the financial eligibility criteria traditionally applied under Medicaid to serve group of people who could not acquire health insurance on their own, but who had too much income or too many assets to qualify for the traditional Medicaid program. To maintain budget neutrality while covering this larger group of residents, the State of Hawaii decided to provide Medicaid services to some residents through a privatized managed-care model.

The State decided to implement its program, known as QUEST, in two phases. In the initial phase (QUEST Phase I), those of its citizens who were aged, blind, and certified

disabled for purposes of the Social Security Act, would not be moved into managed care through QUEST, but would continue to receive services through the traditional Medicaid fee-for-service program. The State of Hawaii made this decision based on concerns that private insurers would not participate in QUEST if the aged, blind and certified disabled were included, and concerns that some of its disabled residents objected to receiving medical services through managed care. Once the QUEST program was successfully established in its initial phase, the State intended to expand it to cover the aged, blind and certified disabled as well.

The decision by the State of Hawaii to exclude the certified disabled from QUEST Phase I plainly has a rational basis and would be upheld under the standard established by this Court in *Heller* v. *Doe*, *supra*, and *City of Cleburne, supra*. Prior to implementing QUEST Phase I, Hawaii received no complaints concerning any perceived problem with the exclusion of the certified disabled, despite the State's publicization of the program. When the Secretary of the United States Department of Health and Human Services, Donna Shalala, approved QUEST Phase I, the exclusion of the aged, blind and certified disabled from the program was clearly explained.[20]

After QUEST Phase I went into effect, however, a complaint was filed against the State of Hawaii, through its Director of Health and Human Services, alleging that the State's rational decision to exclude the certified disabled from QUEST Phase I violated the ADA, the Rehabilitation Act,

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[20] Hawaii received approval for its QUEST Phase I program from the United States Health Care Financing Administration ("HCFA") and from the United States Department of Health and Human Services. *Burns-Vidlak* v. *Chandler*, 939 F. Supp. 765, 767 (D. Haw. 1996). The approval by DHHS of QUEST Phase I was far from a rubber stamp process. DHHS had twice rejected Oregon's proposed experimental Medicaid project because of perceived ADA violations. *See* Philip G. Peters, Jr., *Health Care Rationing and Disability Rights*, 70 Ind. L.J. 491, 502-05 (1995).

and the Equal Protection Clause. *Burns-Vidlak* v. *Chandler*, 939 F. Supp. at 766. The plaintiffs in *Burns-Vidlak* were ineligible to participate in QUEST Phase I because they were certified disabled, and they failed to qualify for traditional Medicaid fee-for-service coverage because they had assets or income in excess of the Medicaid requirements.[21] The district court granted summary judgment for the plaintiffs, finding that but for their certified disability, they could have received medical assistance through QUEST Phase I. *Id.* at 771.[22] The court held that although the State made a "good faith effort to implement improved and more cost effective health care services through QUEST," the plaintiffs were entitled to recover damages as a result of the "discrimination." *Id.* at 773. The court subsequently determined that the full panoply of remedies was available to plaintiffs, including the potential for punitive damages, *see Burns-Vidlak* v. *Chandler*, 980 F. Supp. 1144, 1152 (D. Haw. 1997), *appeal dismissed*, 165 F.3d 1257 (9th Cir. 1999), certified a class, and found the State liable to the class for damages. At the

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[21] To qualify for traditional Medicaid, individuals had to earn less than 100% of the poverty level and have fewer than $2000 worth of assets. The pilot program, QUEST Phase I, on the other hand, had no asset test, and required that individuals have income less than 300% of the poverty level. *Burns-Vidlak*, 939 F. Supp. at 768.

[22] This is not to say that no disabled individuals, as defined by the ADA, participate in QUEST Phase I, which excluded only the *certified* disabled pursuant to the Social Security Act. *See* 42 U.S.C. § 423(d)(1) (definition of disabled pursuant to the Social Security Act). Because of differences between the definition of disabled in the Social Security Act and that in the ADA, there are likely individuals who are disabled for the purposes of the ADA who participate in QUEST Phase I because they have not been certified disabled by the Social Security Administration or the State of Hawaii. *See generally Cleveland* v. *Policy Management Sys., Corp.*, 526 U.S. 795, 801 (1999) (discussing differences in the definition of disabled between the Social Security Act and the ADA).

district court's instruction, approximately 350 individual plaintiffs filed separate lawsuits to establish class membership and damages. As a result, the State of Hawaii must now defend itself from these numerous claims involving millions of dollars of compensatory claims, millions of dollars in attorney fee requests, and, adding insult to injury, a pending punitive damages claim.[23]

As great as that monetary burden may be, more important to the State of Hawaii is the liability it now faces for its attempt to cure the discrimination found in *Burns-Vidlak.* When faced with the *Burns-Vidlak* complaint, the State of Hawaii correctly anticipated the federal district court's declaration of a violation of the ADA, and moved swiftly to remedy the "violation." By April 1996, the State of Hawaii had amended QUEST Phase I to require all participants to meet the same asset test contained in the traditional fee-for-service Medicaid program. These amendments did not provide the members of the *Burns-Vidlak* class – who were certified disabled residents with assets in excess of that required to obtain traditional Medicaid services – with medical assistance, but instead eliminated coverage for approximately 30,000 Hawaii residents who were not certified disabled who had previously participated in QUEST Phase I, but had too many assets to qualify for traditional Medicaid.

By the time the district court granted summary judgment in *Burns-Vidlak*, the State had already amended the QUEST Phase I regulations. The district court, after hearing from the

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[23] As of June 1, 2000, the State of Hawaii has committed to paying $1,165,958 on these claims, with the claims of several hundred class members yet to be disposed of. The total figure includes $357,612 for compensatory damage claims that have been settled, $305,824 for compensatory damages claims that have been tried and gone to judgment, and $502,522 in costs and fees for the cases that have gone to trial. Appeals of the liability determinations for a number of these individual cases are currently pending before the Court of Appeals for the Ninth Circuit.

plaintiffs on the issue, concluded that QUEST Phase I, as modified, did not deny "coverage for blind or disabled individuals solely on the basis of their disability." 939 F. Supp. at 767. On December 27, 1997, the regulations for QUEST Phase I were again amended, this time to conform the payments required of QUEST Phase I participants with the spend-down requirements contained in the traditional Medicaid fee-for-service program. [24]

Two years after the district court in *Burns-Vidlak* had found the plaintiffs' claims for injunctive relief moot, William Sterling, a member of the *Burns-Vidlak* class, brought a second class action suit. In the *Sterling* case, the district court found the State of Hawaii liable for discrimination because under the April 1996 amended regulations, the certified disabled, who are ineligible for QUEST Phase I, were required through the Medicaid spend-down procedures to pay more for medical assistance than were non-disabled individuals of similar means who participated in QUEST Phase I. *Sterling* v. *Chandler,* No. 98-00258 SOM (D. Haw. Oct. 9, 1998).[25]

The attempt by Hawaii to provide medical assistance to a broader group of residents while using the same amount of Medicaid funds has been essentially defeated by these suits. The group of needy residents to whom Hawaii sought to

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[24] Between April 1996 and December 27, 1997, State regulations required QUEST Phase I participants to pay a fixed monthly premium for services as long as their monthly income was between 100% and 300% of the federal poverty level. The certified disabled, however, were subject to traditional Medicaid rules that required them to "spend down" their income each month to a specified level before receiving coverage. For an explanation of the spend-down provisions of the Medicaid program, see *California Dep't of Health Serv.* v. *United States Dep't of Health & Human Servs.*, 853 F.2d 634, 635-36 (9th Cir. 1988).

[25] An appeal of the *Sterling* decision is currently pending in the Court of Appeals for the Ninth Circuit, with oral argument scheduled for August, 2000.

provide medical assistance lost coverage due to the changes implemented in response to the *Burns-Vidlak* suit. The State of Hawaii has been found liable for money damages for not providing the certified disabled with coverage under QUEST Phase I, even though elimination of the allegedly discriminatory distinctions did not provide the certified disabled with coverage under the program. And in the *Sterling* case, the State faces damages awards for the changes it made to QUEST Phase I *in an attempt to comply with the ADA*, and which were shared by the State with both the federal district court and with counsel for the disabled.

B. The State of Hawaii Was Found Liable for Violating the ADA Through Its Facially Neutral Century Old Animal Quarantine Program

Hawaii is one of the few places in the world which is completely free from rabies. To protect the State from the importation of rabies, the Hawaii Department of Agriculture, pursuant to a law enacted by the State legislature, required a 120-day quarantine on carnivorous animals entering the State. Visually impaired persons who use guide dogs sued the State of Hawaii, through its officials, alleging that Hawaii's quarantine violates the ADA. The Ninth Circuit Court of Appeals agreed and held that the quarantine requirement discriminated against visually-impaired individuals in violation of the ADA. *Crowder* v. *Kitagawa*, 81 F.3d 1480, 1485 (9th Cir. 1996). Rather than invalidating the quarantine requirement, however, the Court of Appeals remanded for a determination of whether plaintiffs' proposed modifications to Hawaii's quarantine were "reasonable modifications" which should be implemented, or "fundamental alterations" which could be rejected by the State. *Id.* at 1485-86. Rather than face the intrusive review required on remand, the State of Hawaii settled the litigation.

There can be no dispute that the State of Hawaii had a rational basis for its quarantine requirement, which applied in a facially neutral manner and was not intended to discrimi-

nate against, or otherwise burden, the disabled. Nevertheless, the State was held liable for violating the ADA for this program and was subject to review by a federal district court that would dictate the details of a quarantine program that was central to the State's ability to protect the health of its residents.

C. The State of Ohio Has Been Burdened With Repayment of $2.5 Million in Nominal Fees Charged to Obtain Handicapped Parking Placards

As part of its federally-mandated program to provide handicapped parking spaces, the State of Ohio permits its disabled residents to obtain handicapped windshield placards to be placed in a car. In order to cover the costs of the placard program, the State of Ohio charged a nominal fee of $5.00 to those disabled residents who wished to purchase a permanent placard. Over a period of about six years, the State collected approximately $2.5 million in fees through this provision. *Thorpe* v. *Ohio*, 19 F. Supp. 2d 816, 818-19 (S.D. Ohio 1998).

A class of Ohio residents and organizations that had paid the fee sued State officials alleging that the fee violated a regulation promulgated under the ADA that prohibits a "surcharge" necessary to "cover the costs of measures . . . that are required to provide [the disabled] with the nondiscriminatory treatment required by the Act." 28 C.F.R. § 35.130(f). The district court, rejecting the State's claim of Eleventh Amendment immunity, held that the surcharge violated the ADA. In addition to an injunction invalidating the fee, the court ordered the State to return to the plaintiff class the $2.5 million it had collected in fees. 19 F. Supp. 2d at 826.

This nominal charge by the State of Ohio would most certainly pass muster under rational basis scrutiny if challenged under the Equal Protection Clause. Yet, Ohio and other states across the country face liability under the ADA

for imposing such nominal charges on the disabled to recover the costs of providing placards.[26]

D. The State of New York Was Held Liable for $300,000 in Damages for "Retaliating" Against a State Employee Who Was Not Even Adjudged Disabled

The State of New York has been found liable for the maximum amount of damages available under Title I of the ADA for actions taken with regard to an employee of the state prison system who was not even disabled pursuant to the definition of the ADA. In *Muller* v. *Costello*, 187 F.3d 298 (2d Cir. 1999), a correctional officer, who developed respiratory difficulties after being hired by the State, alleged that he was discriminated against on the basis of a disability when the State was unable to promise him a smoke-free work environment. The plaintiff repeatedly chose to schedule himself for shifts which required him to work in parts of the prison where smoking was allowed. The jury awarded the plaintiff a total of $420,300 in damages, which included $285,000 for pain, suffering and mental anguish. *Id.* at 306. The award was capped by the district court at $300,000 pursuant to 42 U.S.C. § 1981a(b)(3)(D). *Id.* at 307.

---

[26] Other States have similarly faced litigation under the ADA invalidating nominal fees paid for handicapped parking placards. *See, e.g., Dare* v. *California*, 191 F.3d 1167 (9th Cir. 1999), *petition for cert. pending* (No. 99-1417) ($6 biennial fee); *McGarry* v. *Director, Dep't of Revenue*, 7 F. Supp. 2d 1022 (W.D. Mo. 1998) ($2 fee); *Duprey* v. *Connecticut*, 28 F. Supp. 2d 702 (D. Conn. 1998) ($5 fee). On the other hand, in *Brown* v. *North Carolina Div. of Motor Vehicles*, 166 F.3d 698 (4th Cir. 1999), *petition for cert. pending* (No. 99-424), the Court of the Appeals for the Fourth Circuit held that Congress had failed to properly abrogate the Eleventh Amendment immunity of the State with regard to this regulation because the regulation was substantive rather than remedial and therefore beyond Congress' power under Section 5 of the Fourteenth Amendment. *Id.* at 707.

On appeal, the Court of Appeals held that there was insufficient evidence from which the jury could conclude that the plaintiff was disabled under the ADA. 187 F.3d at 313, 314. The Court of Appeals nonetheless affirmed the jury award on the basis that it could be justified by the jury's separate finding that the defendants had retaliated against the plaintiff for invoking his rights under the ADA.

Thus, the State was found liable for $300,000 in damages for actions taken with regard to an individual who wasn't disabled at all. In addition, pursuant to this Court's decision in *Cleburne*, the State undoubtedly would be allowed to make rules of general applicability that had an incidental effect on disabled State employees – here a rule that prison employees must be available to patrol all areas of the facility – without being held liable under the Equal Protection clause.

* * *

While the *Amici* States maintain that the ADA does not properly abrogate their immunity from suit for money damages in federal court, they do not wish through this brief to signal that they have lessened their commitment to protecting their disabled residents from discrimination. To the contrary, *Amici* States intend to continue their commitment to protecting the rights of the disabled through the provisions of State law. In addition, any State that wishes to make the protections of the ADA available to its residents through the availability of money damages actions in federal court may waive its immunity from such suits. But under this Court's decisions, Congress simply lacks the authority to abrogate the States' immunity under the ADA.

CONCLUSION

For the foregoing reasons, the judgment of the Court below should be reversed.

Respectfully submitted,

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APPENDIX A

STATE LAWS PROTECTING THE DISABLED FROM DISCRIMINATION

Alabama	Ala. Code §§ 21-4-1 *et seq.*, 21-7-1 *et seq.*, 24-8-1 *et seq.*
Alaska	Alaska Stat. §§ 18.80.200 *et seq.*, 39.25.160, 47.80.010 *et seq.*
Arizona	Ariz. Rev. Stat. §§ 41-1461 *et seq.*, 41-1491 *et seq.*, 41-1492 *et seq.*
Arkansas	Ark. Code Ann. §§ 16-123-101 *et seq.*, 16-123-201 *et seq.*, 20-76-202
California	Cal. Civ. Code §§ 51, 51.5, 52, 54 *et seq.*; Cal. Gov't Code §§ 11135 *et seq.*, 12920 *et seq.*, 12940, 12955 *et seq.*
Colorado	Colo. Rev. Stat. §§ 24-34-401 *et seq.*, 24-34-501 *et seq.*, 24-304-601 *et seq.*, 27-10.5-101 *et seq.*
Connecticut	Conn. Gen. Stat. § 46a-60, 46a-64, 46a-64c, 46a-70, 46a-71
Delaware	Del. Code Ann. tit. 6, §§ 4500 *et seq.*, 4600 *et seq.*; Del. Code Ann. tit. 19, § 720 *et seq.*; Del. Code Ann. tit. 25, § 5116
Florida	Fla. Stat. Ann. §§ 110.233, 112.042, 413.08, 760.01 *et seq.*, 760.20 *et seq.*

Georgia	Ga. Code Ann. §§ 8-3-200 *et seq.*, 30-1-1 *et seq.*, 30-3-1 *et seq.*, 34-6A-1 *et seq.*, 43-40-25, 45-19-20 *et seq.*
Hawaii	Haw. Rev. Stat. §§ 76-1, 78-2, 347-1 *et seq.*, 368-1 *et seq.*, 378-1 *et seq.*, 489-1 *et seq.*, 515-1 *et seq.*
Idaho	Idaho Code §§ 56-701 *et seq.*, 67-5901 *et seq.*
Illinois	775 Ill. Comp. Stat. § 5/1-101 *et seq.*
Indiana	Ind. Code §§ 22-9-1-1 *et seq.*, 22-9-5-1 *et seq.*, 22-9.5-1-1 *et seq.*, 22-9-6-1 *et seq.*
Iowa	Iowa Code §§ 216.1 *et seq.*, 216C.1 *et seq.*
Kansas	Kan. Stat. Ann. §§ 44-1001 *et seq.*, 44-1015 *et seq.*, 58-1301 *et seq.*
Kentucky	Ky. Rev. Stat. Ann. § 344.010 *et seq.*
Louisiana	La. Rev. Stat. Ann. §§ 23:322 *et seq.*, 46:2251 *et seq.*, 49:145 *et seq.*, 51:2231 *et seq.*
Maine	Me. Rev. Stat. Ann. tit. 5, §§ 781 *et seq.*, 4551 *et seq.*, 7051 *et seq.*
Maryland	Md. Ann. Code art. 49B, § 1 *et seq.*; Md. Code Ann., State Pers. & Pens. § 2-302
Massachusetts	Mass. Gen. Laws ch. 151B, § 1 *et seq.*; Mass. Gen. Laws ch. 272, §§ 92A, 98

Michigan	Mich. Comp. Laws § 37.1101 *et seq.*
Minnesota	Minn. Stat. § 363.01 *et seq.*
Mississippi	Miss. Code Ann. §§ 25-9-149, 43-6-1 *et seq.*, 43-6-101 *et seq.*, 43-33-723
Missouri	Mo. Rev. Stat. § 213.010 *et seq.*
Montana	Mont. Code Ann. §§ 49-1-102, 49-2-301 *et seq.*, 49-3-201 *et seq.*, 49-4-101 *et seq.*
Nebraska	Neb. Rev. Stat. §§ 20-126 *et seq.*, 20-301 *et seq.*, 48-1101 *et seq.*
Nevada	Nev. Rev. Stat. §§ 118.010 *et seq.*, 281.270, 613.310 *et seq.*, 651.050 *et seq.*
New Hampshire	N.H. Rev. Stat. Ann. § 354-A:1 *et seq.*
New Jersey	N.J. Stat. Ann. § 10:5-1 *et seq.*
New Mexico	N.M. Stat. Ann. §§ 28-1-1 *et seq.*, 28-7-1 *et seq.*
New York	N.Y. Exec. Law § 290 *et seq.*
North Carolina	N.C. Gen. Stat. §§ 41A-1 *et seq.*, 126-16 *et seq.*, 168-1 *et seq.*, 168A-1 *et seq.*
North Dakota	N.D. Cent. Code §§ 14-02.4-01 *et seq.*, 14-02.5-01 *et seq.*
Ohio	Ohio Rev. Code Ann. § 4112.01 *et seq.*
Oklahoma	Okla. Stat. tit. 25, § 1101 *et seq.*

Oregon	Or. Rev. Stat. §§ 659.400 *et seq.*, 659.436 *et seq.*
Pennsylvania	Pa. Stat. Ann. tit. 43, § 951 *et seq.*
Rhode Island	R.I. Gen. Laws §§ 28-5-1 *et seq.*, 34-37-1 *et seq.*, 42-87-1 *et seq.*, 42-112-1 *et seq.*
South Carolina	S.C. Code Ann. §§ 1-13-10 *et seq.*, 31-21-10 *et seq.*, 43-33-10 *et seq.*, 43-33-510 *et seq.*
South Dakota	S.D. Codified Laws § 20-13-1 *et seq.*
Tennessee	Tenn. Code Ann. §§ 4-21-601 *et seq.*, 5-23-104, 8-50-103, 68-14-601 *et seq.*, 68-120-201 *et seq.*
Texas	Tex. Hum. Res. Code Ann. § 121.001 *et seq.*; Tex. Lab. Code Ann. § 21.001 *et seq.*; Tex. Prop. Code Ann. § 301.001 *et seq.*
Utah	Utah Code Ann. §§ 26-30-1 *et seq.*, 34A-5-101 *et seq.*, 57-21-1 *et seq.*
Vermont	Vt. Stat. Ann. tit. 3, §§ 961 *et seq.*, 1026 *et seq.*; Vt. Stat. Ann. tit. 9, §§ 4500 *et seq.*; Vt. Stat. Ann. tit. 21, §§ 495 *et seq.*, 1621 *et seq.*, 1721 *et seq.*
Virginia	Va. Code Ann. §§ 2.1-714 *et seq.*, 36-96.1 *et seq.*, 51.5-1 *et seq.*
Washington	Wash. Rev. Code § 49.60.010 *et seq.*

West Virginia	W. Va. Code §§ 5-11-1 *et seq.*, 5-11A-1 *et seq.*
Wisconsin	Wis. Stat. §§ 106.50, 106.52, 111.31 *et seq.*, 230.18
Wyoming	Wyo. Stat. Ann. §§ 27-9-101 *et seq.*, 35-13-201 *et seq.*

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In The

Supreme Court of the United States

UNIVERSITY OF ALABAMA AT BIRMINGHAM BOARD OF TRUSTEES, et al.,

Petitioners,

v.

PATRICIA GARRETT, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF *AMICUS CURIAE*, THE ASSOCIATION OF STATE CORRECTIONAL ADMINISTRATORS, IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Eleventh Amendment to the United States Constitution bars suits by private citizens in federal court under the Americans with Disabilities Act against non-consenting states.

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INTEREST OF *AMICUS CURIAE*[1]

The Association of State Correctional Administrators ("ASCA") is a professional association whose membership includes the Directors of the fifty state Departments of Corrections, Puerto Rico, the United States Virgin Islands, and four large urban correctional systems (Cook County, Illinois; New York City, New York; Philadelphia, Pennsylvania; and Washington, D.C.). Through these top correctional administrators, ASCA seeks the improvement of correctional services and practices.[2]

---

[1] The Association of State Correctional Administrators files this brief as *amicus curiae* in support of Petitioner, pursuant to Sup. Ct. R. 37.2. A letter of the Petitioner, dated June 7, 2000, a letter of the Respondent, dated June 7, 2000, and a letter of Intervenor United States, dated June 13, 2000, by which counsel for the parties evidenced their consent to the filing of this brief, have been filed with this Court.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation and submission of this brief.

[2] ASCA's mission is to improve correctional services and practices by promoting and facilitating:

> (1) the exchange of ideas and philosophies at the top administrative level of correctional planning and policy-making;
>
> (2) the advancement of correctional techniques, particularly in the areas of program development, design of physical facilities, staff training, and correctional management facilities;
>
> (3) public support for and understanding of the criminal justice system;

As the top managers of state correctional facilities, ASCA's members bear the daily responsibility of maintaining the majority of the nation's prisoners in a safe, orderly, and secure environment. The Americans with Disabilities Act ("ADA" or "Act"), as applied to corrections employees and inmates, has been a matter of deep concern for state prison administrators, which led ASCA to adopt a resolution urging that the ADA not be applied to state and local prisons. *See ASCA Resolution, Americans with Disabilities Act* (Jan. 15, 1995).

ASCA submits this brief for the purpose of informing the Court of the ways in which the Americans with Disabilities Act seriously has burdened the efficient and proper administration of state prisons and to argue that the Act is not a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment. Therefore, pursuant to the Eleventh Amendment, the federal courts lack

---

> (4) research in correctional practice, anti-social behavior, causes of crime and delinquency, and cooperation in research;
>
> (5) the development and application of correctional standards and accreditation;
>
> (6) the fostering of legislative and other measures designed to accomplish th[ese] objective[s];
>
> (7) the exchange of information with international agencies and organizations interested in correctional programs; and
>
> (8) the undertaking of such work and projects of an allied character as may be authorized by the membership.

Letter from George Camp, Executive Director, *The Association of State Correctional Administrators* 1 (Feb. 6, 1998).

jurisdiction over such claims in the absence of consent by the state. The members of ASCA firmly believe that the ADA severely undermines their public duties as state officials.

STATEMENT OF FACTS RELATING TO STATE PRISON SYSTEMS

In the United States, there are currently over 1,000,000 inmates confined in state prisons, which employ 383,028 staff members (330,862 institutional staff, 23,884 central/regional office staff, and 28,282 other staff). *See* CAMILLE GRAHAM CAMP & GEORGE M. CAMP, THE CORRECTIONS YEARBOOK 1998, 1-9, 138 (Criminal Justice Institute 1998) (hereinafter CORRECTIONS YEARBOOK) (As of January 1, 1998, there were 1,038,158 inmates confined in prisons administered by the states and Washington, D.C. There were 101,441 inmates confined in the Federal Prisons. In addition, 29,203 inmates under state correctional control were confined in other facilities, such as hospitals or community-based programs; 39,988 state prisoners were housed in local jails, often due to crowding; and 40,805 inmates were held in contracted facilities. These statistics do not include those inmates otherwise required to be incarcerated in local jails, such as pretrial detainees and inmates serving short sentences). Requiring the state prison administrators to comply with the regulatory scheme of the ADA unduly interferes with sound prison management, precludes administrators from setting fiscal and operational priorities in the public's interest, and impermissibly infringes upon the

sovereignty of the states. This is true whether the ADA is applied to prison employees or inmates.

Applying the ADA to employees and inmates in state and local prison systems has profound implications. The ADA has very broad eligibility criteria. The term "disability" with respect to an individual includes any "physical or mental impairment that substantially limits one or more major life activities." 28 C.F.R. § 35.104 (1999). The phrase "physical or mental impairment" embraces a myriad of mild to more serious conditions and includes permanent and temporary ailments. *See id.* Such conditions encompass mental or psychological disorders (including mental retardation), emotional or mental illness, orthopedic conditions, specific learning disabilities, visual impairments, hearing impairments, heart disease, diabetes, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism. *See id.*

Prison Employees. When this broad-ranging statute is applied to prison employees, the safety of all is at stake. Corrections officers have been described accurately as having "[t]he most dangerous job in America." *See* Bruce Porter, *Terror on an Eight Hour Shift*, N.Y. Times Magazine, Nov. 26, 1995, at 44 (describing experience of correctional officer held hostage during 11-day prison riot).

Corrections officers who manage prison cellblocks are unarmed and greatly outnumbered by persons so dangerous that our society will not allow them to walk the street. The tedium of a cellblock routine has the potential to explode, no matter how assiduous correctional officials are. Prisoner assaults on corrections officers are an inevitable part of prison life. In 1997, for

example there were 13,375 assaults committed by inmates against corrections staff. *See id.* at 40. Corrections officers are expected to maintain peace, prevent escapes, and protect inmates and staff from assaults. At the same time, they are expected to ensure the delivery of wide-ranging services, such as food, medical care, education, and treatment programs.

The presence of a disabled corrections officer, whom the inmates perceive as physically, mentally, or emotionally weak, can trigger serious problems in the prison setting. Prisoners hardly can be expected to conform their opinions, conduct, and criminal plans to society's accepted views concerning the disabled. It is a fact that predatory prisoners prey on disabled prisoners. *See, e.g., Clark v. California*, 1996 U.S. Dist. LEXIS 21630 (N.D. Cal., Oct. 1, 1996) (citing instances of inmates being physically and mentally abused by the general prison population because of their disabilities); *Wilson v. Vaughn*, 1996 U.S. Dist. LEXIS 22420 (E.D. Pa. Aug. 13, 1996) (describing Department of Corrections policy designed to protect disabled inmates from dangers of general population); Sandra J. Carnahan, *The Americans With Disabilities Act in State Correctional Institutions*, 27 Cap. U.L. Rev. 291 (1996) (describing regulations designed to protect disabled inmates, who are often preyed upon by other violent and manipulative inmates). It is unreasonable to presume that these same predatory prisoners would not also prey on disabled corrections employees or attempt to exploit their physical, emotional, or mental limitations.

For these reasons, there are often difficult judgments to be made in balancing the rights of the disabled, whether employee or inmate, with the critical need for

prison security. Corrections administrators need flexibility to make these difficult judgments. While their discretion is certainly constrained by many other laws, including the federal and state constitutions, civil service laws, and state civil rights laws, the ADA and its regulations are an extreme and unjustified intrusion that commandeers the operation of state and local prisons. The ADA's highly detailed remedial scheme (designed for general employment situations) does not appropriately consider or value the inherent difficulties of the prison environment. This Court has acknowledged the difficult job facing corrections administrators and officers and deferred accordingly. *See, e.g., Hudson v. McMillian,* 503 U.S. 1, 6 (1992); *Turner v. Safley,* 482 U.S. 78, 84-85 (1987); *Whitley v. Albers,* 475 U.S. 312, 321-22 (1986); *Procunier v. Martinez,* 416 U.S. 396, 404-05 (1974).

The ADA's one-size-fits-all scheme irrationally forces corrections administrators either to compromise their security responsibilities or to risk costly and intrusive ADA litigation by the disappointed employee. Either option is a dead-weight loss on state prison systems and an unwarranted interference with these state officials' important public duties.

Prison Inmates. The Act's broad definition of disability places extreme burdens on prison systems. State correctional facilities house large number of prisoners who fall within these definitions. Indeed, inmates with past drug and alcohol dependencies are estimated to comprise 80% of prisoners. *See* THE NATIONAL CENTER ON ADDICTION AND SUBSTANCE ABUSE, BEHIND BARS: SUBSTANCE ABUSE AND AMERICA'S PRISON POPULATION (1998). Prison populations are also likely to have disabilities in proportions larger

than the general public. *See, e.g.*, Malcolm L. Lachance-McCullough & James M. Tesoriero, *AIDS, in* ENCYCLOPEDIA OF AMERICAN PRISONS (Marilyn D. McShane & Frank P. Williams III eds., 1996) ("HIV infection rates in prison exceed the general population by as much as five or six to one." A National Institute of Justice/Center for Disease Control survey "reflected an AIDS incidence rate in prison that was twenty times higher than that of the 1992 U.S. general population"); Louis and Carol Veneziano, *Disabled Inmates, in* ENCYCLOPEDIA OF AMERICAN PRISONS, *supra*, at 159 (A survey of all state and federal prison systems found that 10.7 percent of inmates have a learning disability, 4.2 percent suffer from mental retardation, 7.2 percent have psychotic disorders, and 12.0 percent have psychological disorders).

These medical issues will be exacerbated as the prison population ages. As of January 1, 1998, state correctional facilities housed 69,994 inmates age 50 years or older. *See* ENCYCLOPEDIA OF AMERICAN PRISONS, *supra*, at 24. As the median age of prisoners rises, the costs of medical care become astronomical. *See generally Prison Care – Our Penitentiaries are Turning into Nursing Homes. Can we afford it?*, MODERN MATURITY, Mar.-Apr., 1997 (citing study that a state inmate over the age of 55 costs $69,000 a year, compared to $22,000 per year for the typical adult inmate).

The heedless sweep of the ADA, as applied to prison contexts, defies common sense and the Constitiution. Not only does the Act cover a wide range of conditions, it also covers those individuals who are related to the prisoner, including a "visitor, spectator, family member, or associate of a 'prisoner' with a disability." U.S. DEPARTMENT OF

JUSTICE, THE AMERICANS WITH DISABILITIES ACT: TITLE II TECHNICAL ASSISTANCE MANUAL (1992) II-2.8000. The Act, at least as interpreted by the Department of Justice, operates at an astonishing level of specificity, dictating specific standards for valet parking, carpet depth, flash rates of visual alarms, bathrooms, numbers of water fountains, seating areas, areas of refuge, and specifications for curb ramps, among others. *See id.* at II-6.3200.

The ADA requires the following benefits for prisoners, among others:

> The regulatory scheme of the ADA creates an affirmative obligation on state correctional departments to provide, *at state taxpayer expense*, "modifications to rules, policies, or practices, the removal of architectural barriers, or the provision of auxiliary aids and services." 42 U.S.C. § 12131(2) (1999).
>
> State correctional departments are required, with limited exceptions, to *ensure* that disabled prisoners participate in and receive the "benefits of services, programs, or activities." 42 U.S.C. § 12132 (1999).
>
> Title II *requires* that state correctional officials appoint and pay for an ADA coordinator to coordinate ADA efforts for the corrections department and investigate ADA complaints. *See* 28 C.F.R. § 35.107 (1999).[3]

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[3] Section 35.107 states:

> A public entity that employs 50 or more persons shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any

> If a state corrections department substantially renovates an old facility, *the department must make substantial architectural changes to the facility*. *See* 42 U.S.C. § 12183(a)(2) (1999).
>
> The regulation establishes strict standards for new construction or alternatives – *specifically, all facilities altered by a state corrections department must be "readily accessible and usable by individual with disabilities."* 28 C.F.R. § 35.151 (1999).

A state corrections department *must* choose from two design standards:

a. the Uniform Federal Accessibility Standards ("UFAS"), which requires, for example, that *five percent of all residential units* in correctional facilities be accessible *regardless of whether the state corrections department needs that number of accessible cells in each state prison*. *See* UFAS, Section 4.1.4 (9)(c) (1999); or

b. the American with Disabilities Act Accessibility Guidelines for Buildings or Facilities ("ADAAG"), which requires, for example, that state correctional facilities spend *up to*

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investigation of any complaint communicated to it alleging noncompliance with this part or alleging any actions that would be prohibited by this part. The public entity shall make available to all interested individuals the name, office address, and telephone number of the employee or employees designated pursuant to this paragraph. 28 C.F.R. § 35.107(a) (1999).

> *twenty percent of their overall alteration expenditures* to establish a "path of travel" in specified areas. *See* ADAAG, 4.1.6(2); 28 C.F.R. § 36.403(f) (1999).

Prison budgets consume huge portions of state budgets. For the fiscal year of 1998, state correctional agency budgets exceeded $27 billion. *See* CORRECTIONS YEARBOOK, *supra* at 86-87 (stating that state correctional budgets for the fiscal year of 1998 were $27,834,553,716, including both operating and capital expenses).

Because prisoners compose the segment of our society that is guaranteed adequate medical care, state correctional departments spend over $2 billion annually for medical operating expenses. *See id.* at 86-87 (stating that state correction operating budgets for medical services in the fiscal year of 1998 were $2,620,753,034). Given these huge costs, corrections departments bear the heavy duty to spend state taxpayer dollars in the most cost effective way, a state sovereign function undermined by the ADA.

The ADA regulatory scheme severely interferes with a state's ability to set its own operational and fiscal priorities in managing disabled prisoners. For example, 28 C.F.R. § 35.130, prohibits prison officials from denying a disabled prisoner "the opportunity to participate in services, programs, or activities that are not separate and different, despite the existence of permissibly separate or different programs or activities." 28 C.F.R. § 35.130(b)(2) (1999). In other words, disabled prisoners are expected to be mainstreamed into the general prison population. *See Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999) (holding that public service portions of the ADA require states to provide community-based treatment for persons with

mental disabilities); *Armstrong v. Wilson*, 942 F. Supp. 1252 (N.D. Cal. 1996), *aff'd*, 124 F.3d 1019 (9th Cir. 1997) (recognizing that the ADA requires public entities to provide services in the most integrated setting appropriate, even though plaintiffs did not object to the concentration of inmates and resources at particular institutions, provided that this was done "in a manner consistent with the ADA"). Under this provision, advocates of the disabled have argued that state officials cannot cluster specialized services for disabled prisoners in certain prison facilities. Rather, they are required to make such services available for each and every state prisoner. This federal directive prohibits the state from conserving state tax dollars by clustering mental health treatment facilities, services for hearing impaired inmates, drug and alcohol programs, or dialysis treatment.

Lower courts have held that the ADA precludes the clustering of similarly afflicted disabled prisoners for treatment or services. *See, e.g., Onishea v. Hopper*, 171 F. 3d 1289, 1298 (11th Cir. 1999); *Carty v. Farrelly*, 957 F.Supp. 727 (D.V.I. 1997); *Armstrong v. Wilson*, 942 F. Supp. 1252 (N.D. Cal. 1996). Yet, sound correctional practice suggests that some disabled prisoners should be segregated from other prisoners to prevent victimization. *See, e.g.*, STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS 3-4145 (American Correctional Assoc., 1990) (requiring that handicapped inmates must be "housed in a manner that provides for their safety and security"); SUPPLEMENTAL STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS 3-4128-2 (American Correctional Assoc., 1998) (recommending that all adult correctional facilities establish written policies

practices and procedures to provide that single occupancy cells are available for inmates with severe medical disabilities, inmates "suffering from serious mental illness," inmates who are likely to be "exploited or victimized by other[s]" and inmates who have "other special needs for single housing").

Indeed, prison officials are caught in a catch-22: the ADA subjects them to liability for separating disabled prisoners while the Constitution subjects them to liability for *failing* to segregate and protect disabled inmates from other prisoners who could harm them. *See Carty v. Farrelly*, 957 F. Supp. 727, 741 (D.V.I. 1997) (holding that placing an inmate who used a cane in a housing cluster designed for mentally ill prisoners violated the ADA); *Love v. Westville Correctional Center*, 103 F.3d 558 (7th Cir. 1996) (upholding damages and attorneys fees under the ADA where correction center housed wheelchair bound inmate in an infirmary).

Because the Act attempts to treat differently situated prisoners in a similar fashion, it causes absurd results. As a result of the ADA's breadth, it covers the prison systems' oversight of both housing and medical treatment. The ADA, literally applied, would preclude removing a prisoner from one housing location based upon a disability, such as renal disease, even though it is more cost effective to treat all renal disease in one location. The ADA would require the prison to modify its existing practices at the current housing location unless it could establish that the modification (providing dialysis treatment at the current institution) would fundamentally alter the nature of the existing program. The rigidity of the ADA, especially as interpreted by the Department of

Justice, does not accommodate the necessary considerations in a prison context. It is blind to the fact that the clustering of prisoners with similar medical needs will provide greater overall benefits to the prisoner, the prison system, and the taxpayer.

The ADA's inflexible regulatory scheme ignores the well-established and reasonable prison classification programs that routinely examine factors such as mental health, mental retardation, and prior drug, and alcohol abuse to determine prisoner classifications and placements. *See, e.g.*, STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS 3-4292 (American Correctional Assoc., 1990) (recommending the use of a classification system that considers drug and alcohol addiction, metal retardation, whether the inmate is emotionally disturbed or suspected of being mentally ill, or other needs for protective custody); *id.* at 3-4128-1 (classification system must evaluate mental and emotional stability and medical status). Through such classification procedures, prisons match prisoner security requirements and programmatic needs with an appropriate facility or program placement. Adult correctional facilities often cluster inmates with chronic mental health problems or mental retardation in specialized housing units that permit these prisoners to enjoy maximum freedom and receive enhanced counseling services away from a general prison population environment where they would be easy targets for assaults, abuse, manipulation, and coercion by predatory prisoners. *See, e.g., Clark v. California*, 1996 U.S. Dist. LEXIS 21630 (N.D. Cal. Oct. 1, 1996) (citing instances of inmates being physically and mentally abused by the general prison population because of their disabilities); *Wilson v.*

Vaughn, 1996 U.S. Dist. LEXIS 22420 (E.D. Pa. Aug. 13, 1996) (describing Department of Corrections policy designed to protect disabled inmates from dangers of general population); Sandra J. Carnahan, *The Americans With Disabilities Act in State Correctional Institutions*, 27 Cap. U.L. Rev. 291 (1996) (describing regulations designed to protect disabled inmates, who are often preyed upon by other violent and manipulative inmates); Elaine Gardner, *Legal Commentary: The Legal Rights of Inmates with Physical Disabilities*, 14 St. Louis U. Pub. L. Rev. 175, 211 (1994). These same practices are brought into question under the ADA's broad-based attack on state sovereignty.

Applied in the prison context, the ADA regulatory scheme would even appear to preclude prison administrators from considering the inmate's history of substance abuse and substance abuse treatment in determining whether to allow the inmate to participate in particular programs: 28 C.F.R. 35.104(1)(ii), (5)(iii) (1999). This is an example of federal imposition of an unwise and dangerous criminal justice policy on the states.

The ADA, thus, requires state prison officials to expend limited state funds in accordance with a high-handed federal regulatory scheme, rather than in accordance with the state's budget priorities and constitutional requirements. The ADA also commandeers local officials to carry out the federal government's agenda by requiring state correctional officials to appoint an ADA coordinator to coordinate the ADA efforts for the corrections

department and to investigate ADA complaints.[4] Yet, the federal government bears none of the cost of such a mandate. The state corrections departments must use their own staff resources, funded by *state* tax dollars, to fill this mandatory position, which can cost a state $100,000 to $150,000 plus benefits. At least one state, Pennsylvania, employs two ADA coordinators, one to oversee employee claims and one to oversee inmate claims. Telephone Interview with Steve Miller, Pa. Dept. of Corrections Employee ADA Coordinator (June 14, 2000). A state corrections department does not even retain the right to use its existing inmate grievance procedures to handle complaints by disabled inmates. *See Purcell v. Pennsylvania Dep't of Corrections*, 1998 U.S. Dist. LEXIS 105 (E.D. Pa. Dec. 29, 1998) (authorizing punitive damage claim for the failure of a state department of corrections to appoint an ADA coordinator even though prison had other officials to resolve inmate disability complaints).

If a state corrections department believes that substantial renovation of an old facility is necessary to

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[4] Section 35.107 states:

> A public entity that employs 50 or more persons shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to it alleging noncompliance with this part or alleging any actions that would be prohibited by this part. The public entity shall make available to all interested individuals the name, office address, and telephone number of the employee or employees designated pursuant to this paragraph. 28 C.F.R. § 35.107(a) (1999).

ensure future compliance with constitutional conditions of confinement, *any* renovations trigger a state obligation to make substantial architectural changes that go well beyond constitutional requirements. In addition to the *program* accessibility requirements of the Act itself, 42 U.S.C. §§ 12101-12213 (1999), the regulatory scheme establishes strict standards for new construction or alterations. Specifically, *all* facilities altered by a state corrections department must be "readily accessible and usable by individuals with disabilities." 28 C.F.R. § 35.151(a) (1999).

A requirement that state prison officials grant prisoners special accommodations in order to avoid ADA litigation or to comply with the ADA also has other adverse effects on prison management. Sound prison management usually requires an orderly prison routine where all prisoners are treated equally. The Act, however, does not simply preclude invidious "discrimination" against disabled prisoners. Rather, the Act is often used to require prison officials to grant special privileges to certain prisoners, or to excuse individual prisoners from complying with generally applicable prison rules. *See Purcell*, 1998 U.S. Dist. LEXIS 105 (authorizing punitive damage claim under the ADA because prison officials did not permit the disabled prisoner to disobey a direct order to report for a medical examination); *Amos v. Maryland Dep't of Public Safety & Correctional Services*, 126 F.3d 589 (1997) (inmates attempt to use ADA to seek transfer to prisons in closer proximity to family residences); *Torcasio v. Murray*, 862 F. Supp. 1482 (E.D. Va.1994), *aff'd*, 7 F.3d 1340 (4th Cir. 1995) (morbidly obese prisoner sought to be

excused from requirement that he stand in line for meals and commissary items).

In prisons, granting special privileges or exempting prisoners from generally applicable requirements is fraught with problems: it can appear that prison officials are engaging in favoritism by granting unwarranted special privileges; it causes resentment among the prison population, which leads to inmate unrest; and it impedes general prison operations when staff must interrupt the normal prison routine. These are decisions left to state officials by the Constitution's inherent federalism principles, and, in the experience of the members of ASCA, rightly so.

The ADA's litigation costs alone place a heavy burden on state prisons. When a prison administrator is confronted with a request to modify a prison practice or procedure for a particular inmate claiming a disability under the ADA, that official is required to weigh whether denying the modification is worth the price of intrusive ADA litigation. The prison official no longer can make decisions based solely upon the people's interests, state law, budget limitations, operational concerns, or the Constitution. Instead, the prison official must also consider the potential administrative burdens of ADA litigation and the potential financial burden of damages and attorneys fees.

The Act's regulatory scheme has armed prison inmates with a litigation weapon that converts a previously frivolous lawsuit into one that can survive pretrial motions and proceed to trial. ADA litigation is extremely fact-intensive, embroiling the federal courts in some of

the most routine prison management decisions. *See, e.g., Torcasio v. Murray,* 862 F.Supp. 1482 (E.D. Va. 1994) (discussing in minute detail a wide range of ADA claims). Given the current provisions of the ADA and regulations, prison administrators can avoid making a modification sought by a prisoner only if the administrator defeats the prisoner's claim of eligibility or meets a high burden of establishing that the proposed modification would fundamentally alter the prison program or service. *See* 28 C.F.R. § 35.130(b)(7). This affirmative defense structure of ADA litigation makes intrusive federal court inquiries necessary to resolve an inmate's claim.

Granting prisoners in state institutions this sort of litigation weapon is a mistake and certainly not mandated by or permissible under the Constitution. Prisoners have demonstrated a historical pattern of clogging the federal court dockets with meritless litigation. *See Carson v. Johnson,* 112 F.3d 818, 822 (5th Cir. 1997) (noting that deterring frivolous and malicious lawsuits by prisoners is a legitimate state interest and the pro se civil rights litigation has become a "recreational activity" for many prisoners); *Procunier v. Martinez,* 416 U.S. 396, 405 n.9 (1974) (noting that the "capacity of our criminal justice system to deal fairly and fully with legitimate claims will be impaired by a burgeoning increase in frivolous prisoner complaints"); *Lewis v. Casey,* 518 U.S. 343, 355 (1996) (noting problems with allowing prisoners to "transform themselves into litigating engines capable of filing everything from stockholder derivative actions to slip-and-fall claims"). Given the number of prisoners who can legitimately claim a disability (even if it is only based upon a *prior* drug addiction), applying the ADA to state prisons

needlessly grants prisoners another weapon for their frivolous litigation arsenal.

Determining that the ADA cannot constitutionally apply to state prisons would not harm any legitimate rights of disabled prisoners. Under the Civil Rights Act, prisoners retain the right to seek injunctive relief and damages for state and federal equal protection violations, cruel and unusual prison conditions, and the denial of adequate medical care. *See* 42 U.S.C. § 1983. Federal courts would still retain the ability to provide prompt and complete relief for actual violations of the constitutional rights of disabled prisoners. Federal courts, however, would be relieved of the obligation to conduct intrusive inquiries into the day-to-day management of the prisons simply to address matters that do not arise to the level of a constitutional violation. Finally the states have the power, if they choose, to protect disabled prisoners more rigorously than the Constitution.

The ADA, as interpreted by the Department of Justice, forces courts to micromanage state and local prisons and intrudes on the state's sovereign and traditional power to govern state prisons in the best interest of their respective citizens. "[A]bsent the most extraordinary circumstances, federal courts are not to immerse themselves in the management of state prisons or substitute their judgment for that of the trained penological authorities charged with the administration of such facilities." *Taylor v. Freeman*, 34 F.3d 266, 268 (4th Cir. 1994) (citations omitted).

SUMMARY OF ARGUMENT

In the state prison context, the ADA is an invalid exercise of Congress's power under Section 5 of the Fourteenth Amendment and therefore violates the Eleventh Amendment, which bars suits by private citizens in federal courts against non-consenting states. *See generally Kimel v. Florida Board of Regents*, 120 S. Ct. 631 (2000); *Florida Prepaid*, 527 U.S. 627 (1999); *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996).

This Court has held that a law passed pursuant to Congress's power under Section 5 of the Fourteenth Amendment must pass a two-step inquiry. *See Kimel v. Florida Board of Regents*, 120 S. Ct. 631 (2000); *Florida Prepaid Post-Secondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999); *Boerne v. Flores*, 521 U.S. 507 (1997). First, there must be evidence of "widespread and persistent" constitutional violations by the states." *Florida Prepaid*, 527 U.S. at 645 (*quoting Boerne*, 521 U.S. at 526); *see also Kimel*, 120 S. Ct. 631. Second, the remedy chosen by Congress must be proportional and congruent to the constitutional wrongs. *See Kimel*, 120 S. Ct. at 635; *Florida Prepaid*, 527 U.S. at 666; *Boerne*, 521 U.S. at 519-520; *see also* Marci A. Hamilton and David Schoenbrod, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment*, 21 CARDOZO L. REV. 469 (1999). The ADA satisfies neither step.

Congress intended to eradicate *all* discrimination against the disabled with the ADA, including a great deal of discrimination that is not unconstitutional. *See* 42 U.S.C. § 12101 (a)(3), (4), (5) (West 1995 & Supp. 1999). As a result, the sweep of the ADA extends well beyond the

boundaries permissible under Section 5 of the Fourteenth Amendment. Nor is the ADA proportional or congruent to any conceivable state constitutional wrongdoing. Its huge coverage and oppressive regime, as applied to state prisons, violates the inherent principles of federalism that limit Congress's exercise of its power under Section 5. Because the ADA is not a valid exercise of power under Section 5, the Eleventh Amendment prohibits private parties from bringing suit in federal court against non-consenting states.

ARGUMENT

I. THE ADA IS NOT A VALID EXERCISE OF CONGRESS'S POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT AND THEREFORE THE ELEVENTH AMENDMENT PROHIBITS SUITS BY PRIVATE PARTIES AGAINST NON-CONSENTING STATES

This Court has held that a law passed pursuant to Congress's power under Section 5 of the Fourteenth Amendment must satisfy a two-part test. *See Kimel v. Florida Board of Regents*, 120 S. Ct. 631 (2000); *Florida Prepaid Post-Secondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999); *Boerne v. Flores*, 521 U.S. 507 (1997). First, there must be evidence of "widespread and persisting" constitutional violations by the states. *Florida Prepaid*, 527 U.S. at 645 (*quoting Boerne*, 521 U.S. at 526); *see also Kimel*, 120 S. Ct. 631. Second, the remedy chosen by Congress must be proportional and congruent to the constitutional wrongs. *See Kimel*, 120 S. Ct. at 635; *Florida Prepaid*, 527 U.S. at 666; *Boerne*, 521 U.S. at 519-520;

see also Marci A. Hamilton and David Schoenbrod, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment*, 21 CARDOZO L. REV. 469 (1999). The ADA fails both requirements.

The ADA was intended to expand the rights of the disabled beyond the Constitution's boundaries. Congress, however, lacks the power to create out of whole cloth new constitutional rights. That power is left to Congress and the states under Article V. *See Boerne v. Flores*, 521 U.S. 507, 529 (1997). "Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." *Florida Prepaid Post-Secondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 638 (1999) (*quoting Boerne*, 521 U.S. at 519). For Congress to exercise its Section 5 power appropriately, there must be proof of a "pattern of constitutional violations," a set of state constitutional violations that rise to a "problem of national import." *Id.* at 627.

In the face of recalcitrant refusal by the states to obey the Constitution's mandates, however, Congress may enact laws forcing the states to obey. On this score, Section 5 of the Fourteenth Amendment states that "[t]he Congress shall have power to enforce [the Fourteenth Amendment] by appropriate legislation." Section 5 corrals Congress into enacting only legislation that is "carefully delimited remediation or prevention of constitutional violations." *Florida Prepaid*, 527 U.S. at 627; *see also* Marci A. Hamilton and David Schoenbrod, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment*, 21 CARDOZO L. REV. 469 (1999).

Under the Eleventh Amendment, Congress may only authorize private suits against the states pursuant to its power under Section 5, and not the enumerated powers. *See generally Kimel v. Florida Board of Regents*, 120 S. Ct. 631 (2000); *Florida Prepaid*, 527 U.S. 627 (1999); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). As a result, if a law is not a valid enactment under Section 5, non-consenting states may not be sued by private parties under that law. The ADA is not a valid exercise of Section 5 power.

A. THE ADA IS NOT BASED ON A HISTORY OF WIDESPREAD AND PERSISTING DEPRIVATIONS OF CONSTITUTIONAL RIGHTS OF THE DISABLED IN STATE PRISONS

This Court has made quite clear that Congress may only employ its enforcement powers under Section 5 of the Fourteenth Amendment when the states have committed "widespread and persistent deprivation of constitutional rights." *Florida Prepaid*, 527 U.S. at 645 (*quoting Boerne*, 521 U.S. at 526); *see also Kimel*, 120 S. Ct. 631. "[F]or Congress to invoke [Section] 5, it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct." *Id.* at 639.

The ADA was enacted not to enforce constitutional guarantees but rather to supplement constitutional rights. 42 U.S.C. § 12101(a)(4) (West 1995 & Supp. 1999). While the term "discrimination" runs through the legislative histories of the ADA and the Rehabilitation Act, it is not shorthand for "unconstitutional discrimination." In fact,

the plain language of the ADA lists many types of discrimination, including discriminatory effects. *See, e.g.*, 42 U.S.C. §§ 12101(a)(3), (5) (1999). The ADA does not supplement available constitutional remedies for the purpose of eradicating unconstitutional state conduct but rather does what Congress may not: "enforce a Constitutional right by changing what the right is." *Boerne*, 521 U.S. at 519. *See also Kimel*, 120 S. Ct. at 644 ("[Congress] has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation" (*quoting Boerne*, 521 U.S. at 519)); *Florida Prepaid*, 527 U.S. 638.

The ADA was intended to rid the United States of *all* discrimination against the disabled, whether that discrimination was constitutionally permissible or not. Congress found that "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs or other opportunities." 42 U.S.C. § 12101 (a)(5); H.R. Rep. 101-485(III) (1990) *reprinted in* 1990 U.S.C.A.A.N. 449 (stating the purpose of ADA "is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities"). Congress's blunderbuss approach violates the Constitution's inherent principles of federalism.

The ADA was passed as though discrimination on the basis of disability is on the same constitutional plane as discrimination on the basis of race. "The Americans

with Disabilities Act completes the circle begun in 1973 with respect to persons with disabilities by extending to them the same civil rights protections provided to women and minorities beginning in 1964." H.R. Rep. No. 101-485(III), at 26 (1990), *reprinted in* 1990 U.S.C.A.A.N. 449.

This Court has made abundantly clear that the two forms of discrimination do not receive the same constitutional treatment under the Equal Protection Clause. *Compare City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505-06 (1989), *with City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442-43 (1985). Therefore, disabilities legislation passed pursuant to Section 5 that uses the tools intended to remedy racial discrimination is constitutionally suspect. *See Kimel*, 120 S. Ct. at 646; *Florida Prepaid*, 527 U.S. at 639; *Boerne*, 521 U.S. at 519-20.

Intentional racial discrimination is subjected to the most searching judicial scrutiny, whether the legisation is intended to harm or to benefit the races being targeted. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995); *City of Richmond v. J.A. Croson*, 488 U.S. 469, 493 (1989). By comparison, intentional discrimination on the basis of disability has been subjected to a considerably lower level of scrutiny, the rational basis test. *Cleburne*, 473 U.S. at 449. Regulations affecting prisons also have been subjected to low level scrutiny. *Turner v. Safley*, 482 U.S. 78 (1987); *see also O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1989).

The constitutionality of discriminatory effects has been treated by this Court as a separate category from

intentional discrimination. Even in the racial discrimination context, discriminatory effects have not triggered strict scrutiny. *Washington v. Davis*, 426 U.S. 229, 242-244 (1976) ("Disproportionate impact is not irrelevant, but, it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, that racial classifications are to be subjected to the strictest scrutiny"). Laws that do not intentionally discriminate against the disabled – but rather only incidentally affect the disabled – have not been the subject of a Supreme Court case. It is a certainty, however, that the Constitution would not require a higher level of scrutiny for discriminatory effects than it does for intentional discrimination. In the disability context, this means that any law that incidentally affects the disabled will be scrutinized under the Constitution for a rational basis at most. The mandatory accommodation regime of the ADA wades far beyond such a standard.

Some have attempted to bootstrap disabilities into the same position under the Equal Protection Clause as race by labeling those with disabilities as a "discrete and insular minority." There are two fundamental problems with this approach. First, this argument assumes that footnote four of *U.S. v. Carolene Products*, 304 U.S. 144, 153 (1938), is the decisive interpretive tool of the Equal Protection Clause. Such a claim, however, is a reach, to say the least. *Cf.* John Hart Ely, *The Supreme Court, 1977 Term – Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 10, 14-15 (1978) (stating that this Court has not followed the *Carolene Products* footnote four approach.)

Second, the range of disabilities potentially covered by the ADA – which is made so stark in the prison

context – is so huge that those covered by the Act are not an identifiable, discrete, or insular collective. Indeed, the potential sweep of the ADA is so broad that one of the most litigated issues under the ADA is whether the particular problem claimed by the person is a disability for purposes of the ADA. *See, e.g., Sutton v. United Air Lines,* 527 U.S. 471 (1999) (holding that nearsightedness is not a disability); *see also Cassidy v. Indiana Dep't of Corrections,* 199 F.3d 374 (7th Cir. 2000) (inmates' claim of emotional distress insufficient to sustain claim under ADA).

B. THE ADA IS NOT PROPORTIONAL OR CONGRUENT TO ANY CONCEIVABLE CONSTITUTIONAL VIOLATIONS BY THE STATE PRISONS

Under Section 5 of the Fourteenth Amendment, Congress must make its legislation redressing state constitutional wrongdoing proportional and congruent to the type and degree of wrongdoing. *See Kimel,* 120 S. Ct. at 635; *Florida Prepaid,* 527 U.S. at 666; *Boerne,* 521 U.S. at 519-520; *see also* Marci A. Hamilton and David Schoenbrod, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment,* 21 CARDOZO L. REV. 469 (1999). Like the Religious Freedom Restoration Act invalidated in *Boerne,* the ADA's sweep is so far beyond the constitutional requirements that it cannot be a valid exercise of Congress's power under Section 5 to remedy constitutional violations. *See Boerne,* 521 U.S. at 532.

With the ADA, Congress did not attempt to fit a remedy to perceived constitutional wrongs, but rather sought to expand the rights of the disabled well beyond

constitutional guarantees. The ADA, as handled by the Department of Justice, requires state prison systems to conform to precise standards derived by the DOJ that far exceed the requirements of the Equal Protection Clause.[5] *See, e.g.*, 36 C.F.R. § 1191.1, at App. A (1999) (providing, *inter alia*, that carpet must have a maximum thickness of no more than 1/2 inch, and that the spout of a drinking fountain must provide a flow of water at least 4 inches high).

The experience of the state prisons that have labored under the ADA proves that there is nothing congruent or proportional about the ADA's mandatory accommodation requirement, which reaches well beyond correcting or preventing unconstitutional discrimination on the basis

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[5] Were this Court to uphold the ADA as a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment, many of the regulations implementing the ADA do not deserve deference and would be vulnerable to attack as unconstitutional delegations of legislative power. While the plain language of the Act requires "reasonable accommodation," the Department of Justice has transformed that language into mandatory, unreasonable accommodation, effecting an unconstitutional delegation of power and an interpretation that does not deserve deference. *See Sutton*, 527 U.S. at 482 ("impermissible interpretation" of plain language of ADA precludes deference to agency's interpretation of ADA); *American Trucking Ass'n v. EPA*, 175 F.3d 1027, 1033 (D.C. Cir. 1999) (finding EPA's construction of Clean Air Act an "unconstitutional delegation of legislative power"), *cert. granted, Browner v. Amer. Trucking Ass'ns*, 120 S. Ct. 2003 (2000); *Amer. Trucking Ass'ns v. Browner*, ___ S. Ct. ___, 2000 U.S. Lexis 3629 (No. 99-1426). The DOJ's "formulation of its policy judgment leaves it free to pick any" accommodation pleasing to itself without meaningful consideration of what is reasonable in the prison context. *See American Trucking*, 175 F.3d at 1037.

of disability. In the state prison context, the ADA is an immodest, incongruent, and disproportional attack on state sovereignty.

CONCLUSION

The ADA is an affront to the states' sovereign authority to operate state prisons and to regulate those imprisoned for violating state laws. In the state prison context, the ADA is an invalid exercise of Congress's power under Section 5 of the Fourteenth Amendment and therefore violates the Eleventh Amendment, which bars suits by private citizens in federal courts against non-consenting states.

Respectfully submitted,

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In the

Supreme Court of the United States

THE UNIVERSITY OF ALABAMA AT BIRMINGHAM, BOARD OF TRUSTEES, and the ALABAMA DEPARTMENT OF YOUTH SERVICES,
Petitioners,

v.

PATRICIA GARRETT and MILTON ASH,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the Eleventh Amendment bar suits by private citizens in federal court under the Americans with Disabilities Act against unconsenting states?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37,[1] Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioners the University of Alabama at Birmingham, *et al.* Written consent for amicus participation in this case was granted by counsel for all parties and lodged with the Clerk of the Court.

PLF was founded 26 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. As a nonprofit public interest foundation incorporated under the laws of California, PLF litigates matters affecting the public interest at all levels of state and federal courts. PLF represents the views of thousands of supporters nationwide and is an advocate for limited government, individual rights, and free enterprise. PLF supports the concepts of federalism and limited government and believes public officials must be respectful of the constitutional limitations on federal power.

This case is another example of Congress' myriad attempts to expand federal power beyond what is provided under the United States Constitution. How this Court answers the questions raised in this case will determine the scope of congressional power and can reenforce that Congress may not amend the Constitution through ordinary legislation. PLF has a long history of amicus curiae participation in this Court and believes its perspective on the need for limiting Congress to its enumerated powers will provide a necessary viewpoint on the issues presented in this case.

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation states that no counsel for a party to this action authored any portion of this brief and that no person or entity, other than amicus curiae, made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE CASE

Respondent Patricia Garrett was employed by the University of Alabama at Birmingham. *Garrett v. University of Alabama at Birmingham Board of Trustees*, 193 F.3d 1214, 1219 (11th Cir. 1999). In August of 1994, she was diagnosed with breast cancer. *Id.* She underwent a lumpectomy and also underwent chemotherapy and radiation treatment until January of 1995. *Id.* During this time, the University repeatedly indicated its intent to transfer her to a less demanding position. *Id.* In March, 1995, on her doctor's orders, she took family medical leave. *Id.* When she returned, the University demoted her to a position with a lower salary. *Id.*

She subsequently filed suit against the University under the Americans with Disabilities Act, the Rehabilitation Act, and the Family Medical Leave Act. *Garrett v. Board of Trustees of the University of Alabama in Birmingham*, 989 F. Supp 1409, 1410 (N.D. Ala. 1998). The trial court granted summary judgment in favor of the University on all three claims, holding that the University, as an arm of the state, is immune from suit in federal court. *Id.* at 1412. On appeal, in a consolidated case, the Eleventh Circuit followed its own precedent, holding that states are not immune from suit under the Americans with Disabilities Act. *Garrett*, 193 F.3d at 1218. It also held that states are not immune from suit under the Rehabilitation Act, but affirmed the dismissal of the Family Medical Leave Act claim on sovereign immunity grounds. *Id.* at 1218, 1220.

On April 17, this Court granted the University's petition for writ of certiorari to resolve a conflict in the circuits. *University of Alabama at Birmingham Board of Trustees v. Garrett*, 120 S. Ct. 1669 (2000). The Court has limited its review to one question: Does the Eleventh Amendment bar suits by private citizens in federal court under the Americans with Disabilities Act against unconsenting states? *Id.*

SUMMARY OF ARGUMENT

This Court's precedents have established that, where Congress is legislating pursuant to its Article I powers and applies such legislation to the states, Congress lacks the authority to abrogate state sovereign immunity. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72 (1996). But when Congress is acting pursuant to its Fourteenth Amendment authority, it may validly abrogate state sovereign immunity. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976); *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 637 (1999) (*Florida Prepaid*).

The Respondents have brought a case against an arm of the State of Alabama under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, *et seq*., a federal statute. *Garrett*, 193 F.3d at 1216. The State of Alabama has asserted that it is immune from suit. *Id.* Consequently, this case turns on the question of whether the ADA has been enacted under the Commerce Clause of Article I, in which case Congress may not abrogate sovereign immunity, or under Section 5 of the Fourteenth Amendment, in which case the Respondents' case may go forward.

As this Court explained in *City of Boerne v. Flores*, 521 U.S. 507 (1997), Section 5 grants to Congress the power to enforce, by appropriate legislation, the rights guaranteed to citizens under the Fourteenth Amendment. *Id.* at 519; U.S. Const. amend. XIV. Inherent within this grant is an affirmative limitation. Specifically, Congress lacks authority to define the substantive contours of Fourteenth Amendment rights; rather, its enactments may only enforce those rights which exist under the Constitution. *Boerne*, 521 U.S. at 519. In *Boerne*, this Court explained that appropriate enforcement legislation is defined by whether the legislation in question is remedial and whether the remedy created by Congress is both congruent and proportional to the unconstitutional behavior sought to be

arrested. *Id.* at 520. As demonstrated here, the ADA does not conform to these standards.

The legislative history of the ADA shows that, while Congress was conscious of the difficulties faced by the disabled, it identified no unconstitutional state action directed at the disabled that demanded a federal remedy through Section 5. Indeed, Congress specifically recognized that, in some arenas, states were making great strides in addressing the special needs of the disabled. Accordingly, the Act itself is not directed at remedying state-sponsored discrimination against the disabled.

Though there are undoubtedly occasions on which the disabled face discrimination that violates the Equal Protection Clause of the Fourteenth Amendment, the ADA, in practice, does more than address unconstitutional discrimination against the disabled. Notwithstanding the ADA's laudable intentions, it does not seek to remedy those instances where state laws or conduct can be said to irrationally or invidiously discriminate against the disabled; rather, it requires states to affirmatively compensate for disabilities that, as a practical matter, present actual impediments to performance or capability. Instead of establishing a level playing field, the ADA, in effect, amounts to a special entitlement for the disabled.

The glut of federal cases that have arisen in the aftermath of the ADA's enactment demonstrate the clear incongruence and disproportionality between the discrimination addressed by the ADA and that subject to attack under the Equal Protection Clause. The rights the ADA vests in the disabled are entirely creatures of statute and bear little or no resemblance to constitutional rights recognized by this Court.

The Equal Protection Clause of the Fourteenth Amendment guarantees that individuals similarly situated are treated equally under the law, and Section 5 gives Congress the power to enact legislation that enforces this guarantee. But the

Equal Protection Clause has never been construed to place an affirmative obligation upon states to compensate individuals for their own natural disabilities, or to make up for social or economic hardships faced by the disabled as a consequence, however unfortunate, of these disabilities. Equating the goals of the ADA with the constitutional principle of Equal Protection would work a substantial change in constitutional construction at odds with the Equal Protection precedents of this Court. Thus, the ADA cannot be said to be a valid enactment under Section 5 to enforce the provisions of the Fourteenth Amendment. Accordingly, this Court should dismiss this case on the grounds that the State of Alabama is immune from suit.

ARGUMENT

I

SECTION 5 OF THE FOURTEENTH AMENDMENT IS THE ONLY PROVISION OF THE CONSTITUTION WHICH GRANTS CONGRESS AN EXPLICIT POWER TO ABROGATE STATE SOVEREIGN IMMUNITY, AND CONGRESS MAY ONLY USE ITS SECTION 5 POWER WHERE ITS LEGISLATION IS DIRECTED AT AND APPROPRIATE FOR REMEDYING OR PREVENTING A STATE'S DEPRIVATION OF AN INDIVIDUAL'S CONSTITUTIONAL RIGHTS

A. In Order to Prevail on Their Claim of Sovereign Immunity, the Petitioners Must Show That the ADA Is Not a Valid Section 5 Enactment

The Eleventh Amendment embodies an affirmative limitation on federal power when Congress seeks to enact legislation directed at the states. *See generally Seminole Tribe*, 517 U.S. 44; *Alden v. Maine*, 527 U.S. 706 (1999). Specifically, the Eleventh Amendment evidences the constitutional design that states, as sovereigns independent from the federal government, are immune from suits by their

own citizens, and Congress has limited power to abrogate this immunity for the purpose of serving federal ends.[2] *Seminole Tribe*, 517 U.S. at 72; *Alden*, 527 U.S. at 712.

A key exception to limits on the federal power to abrogate state sovereign immunity is Congress' authority to enforce the provisions of the Fourteenth Amendment to the United States Constitution. *Fitzpatrick v. Bitzer*, 427 U.S. at 456, *Florida Prepaid*, 527 U.S. at 630. Section 5 of the Fourteenth Amendment granted Congress the power to direct legislation toward the states for the express purpose of enforcing the provisions of that Amendment, and necessarily includes within it the power to abrogate state sovereign immunity. *Fitzpatrick*, 427 U.S. at 456. As a result, when a state asserts as a defense to a federal claim that it is immune from suit, it becomes necessary to inquire whether the federal statute at issue was passed pursuant to Congress' Article I powers or Congress' power under Section 5 of the Fourteenth Amendment.

At issue in this case is the ADA. The purpose of this federal statute is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). In passing this law, Congress invoked both its Article I commerce power and its enforcement power under Section 5 of the Fourteenth Amendment. *Id.* at § 12101(b)(4). While the State of Alabama does not challenge the validity of the ADA insofar

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[2] As this Court explained in *Alden*, state immunity from suit in federal court is not limited to the narrow range of cases described by the Eleventh Amendment, but instead evinces a broader notion of state sovereign immunity that is inherent in the design of the Constitution. *Alden*, 527 U.S. at 711-30. However, an assertion of state sovereign immunity is generally referred to as an assertion of Eleventh Amendment immunity.

as it regulates commerce, the state does contend that the ADA does not enforce the Equal Protection Clause.[3]

In *City of Boerne v. Flores*, this Court firmly established that Congress' Section 5 enforcement powers were bound by the language of the Fourteenth Amendment itself; specifically, Congress' power extended only so far as the enforcement of constitutional rights protected by the Fourteenth Amendment, and did not extend to defining those rights. *Boerne*, 521 U.S. at 519. Accordingly, in assessing the validity of legislation alleged to be a Section 5 enactment, the analysis necessarily entails looking at the scope of the constitutional right as defined by this Court and comparing that to what the federal legislation seeks to address. And while there does not need to be an exact "fit" between the conduct the legislation reaches and what the Constitution protects in order to be valid under Section 5, *id.* at 518, the legislation must be directed at remedying or preventing a state's violation of constitutional rights, *id.* at 524-25; *see also Florida Prepaid*, 527 U.S. at 638; *College Savings*, 527 U.S. at 672. Further, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne*, 521 U.S. at 520. If it does not meet these standards, the legislation cannot be said to be "enforcing" the provisions of the Fourteenth

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[3] In *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998), this Court expressly refused to decide the issue of whether the ADA was valid under either Section 5 or the Commerce Clause. *Id.* at 213. *Yeskey* dealt with the application of the ADA to a prisoner who claimed rights under the ADA regarding his treatment by the state prison system. *Id.* at 208. Should this Court find that the ADA is only valid as a Commerce Clause enactment, it is doubtful that claims like Yeskey's could survive as a valid application of Congress' power to regulate interstate commerce. *See generally United States v. Morrison*, 120 S. Ct. 1740 (2000).

Amendment but is, instead, substantive: it creates a federal statutory right, but does not enforce a constitutional one.

B. In Deliberating Upon the ADA, Congress Made No Specific Findings That States Were Unconstitutionally Infringing Upon The Equal Protection Rights of the Disabled

The first inquiry in determining whether the ADA is remedial is whether Congress made any findings that states have systematically violated the constitutional rights of the disabled as defined by this Court, *Boerne*, 521 U.S. at 530, and second, whether the ADA itself is directed at remedying or preventing such violations:

> [T]o invoke § 5, [Congress] must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct.

Florida Prepaid, 527 U.S. at 639, *see also id.* at 639-40 ("Following *City of Boerne*, we must first identify the Fourteenth Amendment 'evil' or 'wrong' that Congress intended to remedy, guided by the principle that the propriety of any § 5 legislation 'must be judged with reference to the historical experience . . . it reflects.'") (citing *Boerne*, 521 U.S. at 525); *Florida Prepaid*, 527 U.S. at 640 (Patent Act was not remedial where Congress had not identified any evidence of widespread violation of patent laws by the states); *Boerne*, 521 U.S. at 530-31 (Religious Freedom Restoration Act was not a remedial where Congress had made no findings of deliberate religious persecution by the states). Accordingly, the first question in determining whether an enactment is valid under Section 5 is whether Congress intended it to be remedial.

Because the ADA addresses both private and state conduct, it is somewhat difficult to distinguish what discriminatory acts, specifically, Congress was focusing on with respect to the states. However, certain provisions of the

ADA are directed solely at states and their political subdivisions. *See* 42 U.S.C. §§ 12132, 12142. Consequently, Congress did examine state conduct in deliberating upon the provisions of the ADA.

As elaborated below, Congress found that, contrary to state and local governments being indifferent or hostile to the needs of the disabled, states were in fact already making great strides in integrating the disabled into the everyday life of the citizenry by increasing access to public accommodations and attempting to meet their special needs through the provision of extraordinary services. Thus, even in 1985, this Court recognized that many states had taken affirmative steps to help the mentally infirm:

> [T]he distinctive legislative response, both national and state, to the plight of those who are mentally retarded demonstrates not only that they have unique problems, but also that the lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice . . . .

City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 443 (1985). Congress did not find otherwise with respect to other disabled individuals.

For example, a primary goal of the ADA is to address the transportation needs of the disabled and, specifically, transportation provided by public entities. *See* 42 U.S.C. §§ 12141-12161. Thus, Section 222 of the Act makes it a violation of the Act for a public entity with a fixed-route public transportation system to purchase or lease a new or used bus unless the bus is accessible to and usable by the disabled, including those who use wheelchairs. 42 U.S.C. § 12142. This portion of the Act also contains provisions wherein, with limited exceptions, a public entity that provides other public transportation services, including paratransit services specifically for the disabled, must provide the disabled a level

of transportation service that is at least equal to that provided for the nondisabled. *See, e.g.*, 42 U.S.C. §§ 12143(a), 12144. Yet the House Report from the Committee on Public Works and Transportation revealed that this "remedy" merely continued the work already begun by the states:

> By the mid-1990's many American cities will have completely accessible fixed route systems. Furthermore, many of the transit systems in America already provide some type of paratransit services to the disabled. *So, the passage of the ADA will not break sharply with existing transit policy.*

H.R. Rep. No. 101–485(I) at 24 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 268 (emphasis added). As pointed out by minority members in the House, most major cities had already addressed these transportation needs: 80% of Seattle's buses were lift-equipped, as were 50% of Milwaukee's and nearly 100% of New York City's—even though the need for this special accommodation was extremely low: less than once per day for the entire Seattle bus system, which had the highest disabled ridership level in the country. *Id.* at 62, *Minority Views of Mr. Bud Shuster, et al.*, *reprinted in* 1990 U.S.C.C.A.N. 267, 300.

In short, with respect to meeting the transportation needs of the disabled—a primary goal of the ADA—there was no unconstitutional discrimination for Congress to remedy or prevent. On the contrary, far from finding that states were irrationally discriminating against the disabled, Congress found that many state and local transit systems had embarked on programs designed specifically to aid the disabled despite the fact that the disabled accounted for only a small fraction of their ridership. Even more, some members of the House of Representatives contended that the mandates imposed by the ADA would counteract state and local efforts to serve the transportation needs of the disabled because the ADA would force local systems to alter their existing programs to conform

to federal, one-size-fits-all, standards and abandon effective programs simply because they were nonconforming. *See id.* at 58-59, *Additional Views of Mr. John Paul Hammerschmidt, et al., reprinted in* 1990 U.S.C.C.A.N. 267, 297. Thus, while Congress was concerned about *increasing* access for the disabled to make public transit universally available, there is no indication that the Act was intended to remedy unconstitutional conduct by public transit systems.

The only other provision of the Act that is directed solely at the states is Section 202, a blanket provision that is uncommonly broad, even for Congress:

> Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Indeed, the breadth of this provision is so marked that the House Report from the Committee on Education and Labor explains it by flatly stating:

> The Committee has chosen not to list all the types of actions that are included within the term "discrimination" . . . because this title essentially simply extends the anti-discrimination prohibition embodied in section 504 [of the Rehabilitation Act, which applies only to federally funded programs] *to all actions of state and local governments.*

H.R. Rep. No. 101–485(II) at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 367.[4] But though the House Report indicates its intentions, it does not tie these intentions to any greater motivation than the goal of making public services more

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[4] *See also Yeskey*, 524 U.S. at 211-12 (noting the breadth of this provision).

accessible to the disabled—certainly not to a need to remedy state-sponsored discrimination against the disabled in violation of their constitutional rights.

Given that Section 202 of the Act reaches virtually every facet of state conduct, it is remarkable, in terms of invoking its Section 5 authority, that Congress did not support it by findings that such a far-reaching remedy was required to address unconstitutional discrimination by the states against the disabled. According to the House Report by the Committee on Education and Labor, the need for Section 202 was explained in total:

> Currently, Title V of the Rehabilitation Act of 1973 prohibits recipients of Federal assistance from discriminating against individuals with disabilities. Many agencies of State and local government receive Federal aid and thus are currently prohibited from engaging in discrimination on the basis of disability. However, where there is no state law prohibiting discriminatory practices, two programs that are exactly alike, except for funding sources, can treat people with disabilities completely differently than others who don't have disabilities. The resulting inconsistent treatment of people with disabilities by different State or local government agencies *is both inequitable and illogical for a society committed to full access for people with disabilities*.

Id. at 37, *reprinted in* 1990 U.S.C.C.A.N. 303, 318-19 (emphasis added).[5] However true, this statement hardly amounts to an indictment that states were infringing upon the constitutional rights of the disabled.[6]

The House Report from the Committee on the Judiciary was somewhat more detailed in its discussion of Section 202, but beyond anecdotal evidence, for example, that police officers had inappropriately arrested epileptics, it identified no pervasive bad conduct on the part of the states in their treatment of the disabled and did not allege that the provision was required to redress unconstitutional state conduct. *See* H.R. Rep. No. 101–485(III) at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 473. The other congressional reports were similarly uncritical of the states. *See* H.R. Rep. No. 101–485(IV) at 38 (1990) (Committee on Energy and Commerce), *reprinted in* 1990 U.S.C.C.A.N. 512, 527 (no discussion of state conduct); H.R. Conf. Rep. No. 101–596 at 67-68 (1990), *reprinted in* 1990 U.S.C.C.A.N. 565, 576-77 (mentioning only that this provision would mandate that states provide 911 emergency telephone services to the hearing and speech impaired).

In sum, the legislative history of the ADA does not support inferences of a pattern of bad faith or bad conduct on the part of the states, let alone any contention by Congress of a need to address discrimination against the disabled as a matter of equal protection. In fact, in the very opening provision of the

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[5] The Committee's findings and testimony regarding the need for the ADA, in general, which consisted of anecdotal evidence on the hardships faced by the disabled, *see id.* at 28-34, *reprinted in* 1990 U.S.C.C.A.N. 303, 310-16, do not support a finding that states were violating the constitutional rights of the disabled. *See Boerne*, 521 U.S. at 530-31.

[6] The House Report from the Committee on Public Works and Transportation did not make any findings on the need for Section 202.

Act, Congressional Findings and Purposes, Congress signaled its understanding that the ADA and the Equal Protection Clause do not enforce the same rights:

> [U]nlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability *have often had no legal recourse to redress such discrimination.*

42 U.S.C. § 12101(a)(4) (emphasis added). Thus, Congress acknowledged that the ADA was not specifically directed at remedying infringements of constitutional rights, for which legal recourse has been available. Indeed, the Fourteenth Amendment, as a rationale for enacting the ADA, seems to have only made its appearance in Congress' invocation of authority.

This absence of congressional findings that states were regularly infringing upon the constitutional rights of the disabled is strong evidence that Congress' purpose in enacting the ADA was not remedial in nature. *Florida Prepaid*, 527 U.S. at 642. More critically here, unlike the Religious Freedom Restoration Act at issue in *Boerne* or the Patent Act at issue in *Florida Prepaid*, the legislative history of the ADA is not primarily burdened by meager or outdated findings. *See Florida Prepaid*, 527 U.S. at 640-641; *Boerne*, 521 U.S. at 530. Rather, the findings made by Congress with respect to the ADA indicate that, rather than being indifferent or hostile to the constitutional rights of the disabled, states were making positive strides in responding to their special needs. As this Court has established that Section 5 grants Congress only a remedial power, *Boerne*, 521 U.S. at 527, this Court should find, consistent with these precedents, that the ADA is not a valid enactment under Section 5.

II

THERE IS A DEMONSTRATED LACK OF CONGRUENCE AND PROPORTIONALITY BETWEEN THE GOALS OF THE ADA AS IT HAS BEEN ENACTED AND APPLIED AND THE PROTECTIONS AFFORDED TO CITIZENS UNDER THE EQUAL PROTECTION CLAUSE

A. Various Mandates of the Act Do Not Comport with Equal Protection Requirements Identified by This Court

There can be no doubt that those with disabilities suffer "discrimination." Nonetheless, there is a marked distinction between that term as it is understood with respect to matters like race or even sex as opposed to matters like disability and age. Whereas there is little reason to suspect, in most cases, that race and sex reflect actual capabilities, age and disability *can* indicate capabilities and, in the case of the disabled, the group itself, though diverse, is *defined* by its capabilities.

This Court has held that the states have broad leeway in making judgments about the relative qualifications of those whom it hires and, presumably by extension, those to whom it offers its services, insofar as those judgments reflect rational rather than irrational presumptions. Thus, for example, in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), this Court found little to object to about Missouri mandating retirement for judges when they reached the age of 70, surmising:

> The people of Missouri have a legitimate, indeed compelling, interest in maintaining a judiciary fully capable of performing the demanding tasks that judges must perform. It is an unfortunate fact of life that *physical and mental capacity sometimes diminish with age.*

Id. at 472 (emphasis added and citations omitted). If, as *Gregory* acknowledges, the Equal Protection Clause permits

age to serve as a proxy for physical and mental capacity sufficient to justify disparate treatment, there can be no doubt that physical and mental abilities themselves provide a sound basis for discrimination, at least in a constitutional sense, so long as that discrimination is not irrational.[7] Thus, in *Cleburne*, this Court established that states may discriminate against the mentally retarded, at least, so long as the discrimination is not irrational:

> [T]hose who are mentally retarded have a reduced ability to cope with and function in the everyday world. Nor are they all cut from the same pattern . . . . They are thus different, immutably so, in relevant respects, and the States' interest in dealing with and providing for them is plainly a legitimate one.

Cleburne, 473 U.S. at 442.

Of course the ADA addresses the disabled, in general, and not solely those who are mentally retarded. However, the premise of *Cleburne's* conclusion that only *irrational* discrimination is unconstitutional holds equally true to other classifications based on disability. *See id.* at 442; *see also Heller v. Doe*, 509 U.S. 312 (1993) (Court applied rational basis review to state law treating the mentally retarded and the mentally ill differently). Like mental retardation, classifications based on physical or other mental disabilities often "reflect[] the real and undeniable differences between the [disabled] and others." *Cleburne*, 473 U.S. at 444. In short, differences in treatment by the states generally reflect material differences between those who have disabilities and those who do not, not merely differences based upon irrational prejudices. Consequently, where the law treats such disabled individuals

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[7] *See also Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 316 (1976), finding that age was a constitutionally allowable proxy for determining the physical preparedness of police officers.

differently than others, the difference may be "not only legitimate but also desirable." *Id.* In such cases, the constitutional guarantee of equal protection only provides that courts will step in when the differences in treatment are illegitimate—where they are based solely upon perceptions or prejudices—rather than the realities of the physical world.[8]

But the ADA makes *any* discrimination against the disabled unlawful, regardless of whether the reason for the discrimination is sound or invidious, or whether a reason exists at all. Thus, neutral physical barriers, such as attend architectural design or transportation services, are deemed by the ADA as "discriminatory" toward the disabled simply by virtue of the fact that not all disabled individuals can easily access them. *See* 42 U.S.C. § 12101(a)(5). Indeed, with limited exception, the provision of any public services that do not affirmatively *cater to* the special needs of individuals classified as disabled under the Act is deemed unlawfully discriminatory. But this is not a remedy that the Equal Protection Clause enforces. Like age classifications, disability

> cannot be characterized as "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and apathy."

Kimel v. Florida Board of Regents, 120 S. Ct. 631, 645 (2000) (quoting *Cleburne*, 473 U.S. at 440). As *Kimel* explained, "[u]nder the Fourteenth Amendment, a state may rely on age as a proxy for other qualities, abilities, or characteristics that are

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[8] Consistent with this reasoning, the lower federal courts have required only a rational basis for state actions that classify based on other disabilities besides mental retardation. *See, e.g., Mitchell v. Commissioner of the Social Security Administration*, 182 F.3d 272 (4th Cir. 1999) (alcoholic); *Hansen v. Rimel*, 104 F.3d 189 (8th Cir. 1997) (hearing impaired); *More v. Farrier*, 984 F.2d 269, 271 (8th Cir.), *cert. denied*, 510 U.S. 819 (1993) (physically disabled).

relevant to the State's legitimate interests." *Kimel*, 120 S. Ct. at 646. Since, as *Kimel* asserts, a state may legitimately rely on age as a proxy for ability, it follows that states may classify based upon ability, alone, without running afoul of the Fourteenth Amendment. But the ADA establishes as a baseline that *any* classification based on disability is unlawful and *must be* remediated. Consequently, the ADA cannot be understood to provide a remedy that is congruent and proportional to the purported constitutional injury of violating the Equal Protection rights of the disabled.

In fact, the disparity between the constitutional standard for equal protection and the standard established by the ADA is plain on the ADA's face. Whereas the Equal Protection Clause permits classifications based on disability so long as those classifications are rational, the ADA simply demands that

> no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Public entities are subject to this demand qualified by very limited exceptions, and these exceptions do not equate to the mere invocation of a "legitimate purpose," which is all that the Equal Protection Clause requires.

For example, Title I, which relates to employment, demands that both public[9] and private employers make

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[9] Congress did not exclude the states from its definition of employers under the ADA, but did exclude the federal government. *See* 42 U.S.C. § 12111(5)(B)(i). This, alone, is some indication that there is a lack of congruence between the ADA and the constitutional obligation of equal protection, since the federal government is bound by the equal protection component of the Fifth Amendment's Due Process Clause just as states are bound by the Equal Protection Clause

(continued...)

"reasonable accommodations" for the disabled that may include:

> [J]ob restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(9)(B). These provisions, by their own terms, mandate more than that the state, as an employer, treat the disabled the same as the nondisabled. Though these provisions may make for sound policy, this Court has never construed the Equal Protection Clause to require special accommodations such as this in the absence of first finding that there has been an infringement of constitutional rights. But the ADA demands them regardless.

In short, the ADA creates a new remedy of entitlement even without an injury; or rather, it imputes an injury simply by virtue of the fact that an individual is disabled. Accordingly, it attempts to compensate disabled individuals for the handicaps that are a natural result of their disabilities, but that compensation is not tied to a finding of invidious or irrational discrimination by the state.

This compensation aspect of the ADA is echoed in other provisions of the Act. For example, in the area of public transportation, public entities are required to provide paratransit services to the disabled if they provide fixed-route systems, subject only to the qualification that public entities may be excused if this requirement constitutes an "undue financial

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[9](...continued)
of the Fourteenth Amendment. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995).

burden." *See* 42 U.S.C. § 12143(a) and (c)(4). Further, "undue hardship," as a defense to the "reasonable accommodation" requirement, is defined by reference to such factors as the cost of the accommodation, the overall financial resources of the employer, and the effect of the accommodation on expenses and resources. 42 U.S.C. § 12111(10)(B). These provisions are an explicit acknowledgment by Congress that compliance with the Act unavoidably requires states to outlay public funds to meet federal requirements. This mandated outlay of public funds to "remedy" discrimination is foreign to Equal Protection analysis in the absence of finding a constitutional violation.

Whereas most civil rights laws addressing discrimination naturally mandate that states refrain from certain conduct, the ADA demands that states engage in affirmative measures. It is, in concept, a mandated entitlement for the disabled. But the Equal Protection Clause has never been understood to require that states grant to certain classes of individuals an entitlement not available to the public in general without a showing that such a step is required to redress a past wrong. Indeed, under the Equal Protection Clause even "benign" classifications that help a class of individuals cannot survive Equal Protection analysis unless its purpose is remedial. *See Adarand*, 515 U.S. at 220-21 (citing *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986) ("'[A] public employer . . . must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted.'")). The ADA's statutory mandate requiring states to take the extra steps of altering its existing practices, programs, and schedules and, if necessary, purchasing special equipment and vehicles to accommodate the specific requirements of disabled individuals, grants the disabled an extraordinary entitlement. Because Congress found no evidence of states regularly engaging in invidious or irrational discrimination, and because the ADA itself does not require such a showing, the ADA cannot be characterized as a remedy

that is "congruent and proportional" to any constitutional evil sought to be redressed.

What Congress defines as "discrimination" in the ADA is indeed, in the dictionary sense, treating those who are disabled differently than those who are not. But when differences in treatment are due to very real differences in circumstance, the constitutional principle of equal protection cannot be understood to require states to take affirmative steps to erase the effects of these different circumstances. Because the ADA demands precisely this remedy, it is not congruent or proportional to the requirements of the Equal Protection Clause.

B. Claims Upheld Under the ADA Clearly Would Not Amount to Violations of the Equal Protection Clause

While it is difficult to catalogue or compartmentalize the glut of cases that have arisen under Section 202 of the ADA, a sampling of claims that have arisen under this Act document the disproportionality between the rights protected by the Equal Protection Clause and the rights Congress created with the ADA.

For example, recently, a federal district court held that a plaintiff could state an ADA claim against the governor of his state by virtue of the fact that the governor had denied state funding to certain programs directed at helping the disabled. *Lewis v. New Mexico Department of Health*, 94 F. Supp. 2d 1217 (D.N.M. 2000). Whatever the underlying merits of this claim, there is no question that the claimant in that case could never have stated an equal protection claim on the same set of facts. Despite the Fourteenth Amendment's unquestionably broad grant of power to Congress to legislate over the states, the Equal Protection Clause has never been construed to prescribe statewide budget allocations.

Other successful claims document how far beyond equal protection the ADA seeks to reach. In *Dare v. California*

Department of Motor Vehicles, 191 F.3d 1167 (9th Cir. 1999), the Ninth Circuit affirmed a lower court decision holding that California's biennial six dollar fee for a handicapped placard violated the ADA rights of the plaintiffs. The court found:

> If public entities place a surcharge on measures that help disabled people achieve . . . parity, disabled people then are paying fees others do not and so are not being treated equally.

Dare, 191 F.3d at 1176. This is a peculiar twist of reasoning, given that the fee was no more than the cost of the placard and the placard granted to disabled individuals *special* privileges, such as the ability to park in specially designated spaces and exemption from certain other parking restrictions, that are plainly unavailable to the nondisabled.

In *State of West Virginia ex rel. Lambert v. West Virginia State Board of Education*, 191 W. Va. 700 (1994), the ADA was held to require that a county board of education provide a signer for a deaf student for the school-sanctioned activity of extra curricular basketball. And in *Anderson v. Department of Public Welfare*, 1 F. Supp. 2d 456 (E.D. Pa. 1998), a federal district court held that the ADA mandates that medical assistance providers provide Braille, large print, and audiotape formats of all managed care information to enable those with visual impairments to obtain necessary care information. Further, in *Heather K. v. City of Mallard*, 946 F. Supp. 1373, 1387 (N.D. Iowa 1996), a federal district court held that a city could be held liable under Section 202 of the ADA for failing to pass an ordinance prohibiting open burning, where the smoke caused by these private activities negatively impacted a child with respiratory ailments.

In sum, ADA cases repeatedly demonstrate that the "remedy" created by Congress is in fact a benefit program that

requires much more than what the Equal Protection Clause demands. The ADA is not a directive to the states to suppress irrational, and therefore unconstitutional, discrimination. Rather, it is a directive to the states to expend material and significant efforts and resources to help the disabled overcome the negative impacts of their disabilities—to create, as it were, a society in which the disabled are, as a practical matter, no longer disabled. But while this ambitious vision may be worthy of our noblest efforts, and may even be achievable, it bears little resemblance to the vision of equal protection espoused by the Constitution.

For this reason, the ADA cannot be understood as congruent and proportional to the Equal Protection guarantee of the Fourteenth Amendment. Accordingly, because the ADA is not a valid enactment under Section 5 of the Fourteenth Amendment to enforce constitutional rights, Congress lacked authority in the ADA to abrogate the State of Alabama's sovereign immunity.

CONCLUSION

The ADA advances a policy that Americans can be proud to espouse. It is indicative of the good will, optimism, and innovation of the American people, who have shown through the ADA their willingness to help the disabled overcome not only ignorant and uncharitable attitudes, but the very real and daunting challenges that their disabilities present. But good will is not a constitutional entitlement and, as a matter of constitutional law, Congress has no power to make the states promote it under Section 5 of the Fourteenth Amendment.

Because the ADA is not a valid Section 5 enactment, Congress may not abrogate a state's sovereign immunity to

enforce its provisions. For this reason, Amicus respectfully requests that this Court REVERSE the decision of the court below, and DISMISS this suit.

DATED: June 20, 2000.

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IN THE

Supreme Court of the United States

THE UNIVERSITY OF ALABAMA AT BIRMINGHAM, BOARD OF TRUSTEES, AND THE ALABAMA DEPARTMENT OF YOUTH SERVICES,

Petitioners,

vs.

PATRICIA GARRETT AND MILTON ASH,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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29pp

QUESTION PRESENTED

Whether the Eleventh Amendment to the United States Constitution bars suits by private citizens in federal court under the Americans with Disabilities Act against non-consenting states.

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PATRICIA GARRETT AND MILTON ASH,

Respondents.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to promote the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The ability of the state to protect its people from crime is the most important of all state interests. While crime is a complex phenomenon with no one cause and no one cure, the

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

imprisonment of felons is, beyond question, an essential component of the effort. In the second half of the twentieth century, we saw the tragic results of going "soft on crime." Beginning in the 1960s, the rate of incarceration per crime plunged, and, not coincidentally, the crime rate soared. See Scheidegger & Rushford, The Social Benefits of Confining Habitual Criminals, 11 Stan. L. & Pol'y Rev. 59, 61 (1999). The public eventually demanded tough sentencing, which has in recent years succeeded in bringing the crime rate down somewhat. *Ibid.* However, the rate is still nowhere near as low as it was in 1960, before our disastrous experiment with leniency, and we must still lock up a much larger proportion of our population than would have been necessary if we had not embarked on that course in the first place.

Our ability to sustain the lower crime rates and to lower them further is threatened by the high cost of incarceration. Corrections expenditures consumed over 27 billion dollars in 1996. U. S. Dept. of Justice, Bureau of Justice Statistics, State Prison Expenditures 1996, p. 16 (1999). Competing demands for limited resources inevitably call for reduced expenditures on prisons.

Capping prison populations for reasons other than sound sentencing policy can have grave, even fatal, consequences for innocent people. University of Chicago economist Steven Levitt studied the impact of artificial caps on the crime rate. See Levitt, The Effect of Prison Population Size in Crime Rates: Evidence from Prison Overcrowding Litigation, 109 Q. J. Econ. 319 (1996). See *id.*, at 335. The litigation he studied caused an increase in violent crime of 7.9 to 8.3% in the jurisdictions affected. Behind these dry statistics lies a staggering toll in human suffering. Innocent people are needlessly murdered, raped, and maimed when the state is unnecessarily prevented from incarcerating dangerous criminals.

Some limits are, of course, necessary. The Constitution, and specifically the Eighth Amendment, must be obeyed. The present case is about the authority of Congress to drive up the

cost of operating state correctional systems by mandating costs which the Eighth Amendment does *not* require. In *Pennsylvania Dept. of Corrections* v. *Yeskey*, 524 U. S. 206, 212 (1998), the Court decided that the language enacted by Congress did impose the American with Disabilities Act in state prisons, even if Congress was entirely oblivious to that application of the statute. The question remains whether this accidental threat to public safety is constitutional. See *id.*, at 212-213.

In the real world of limited resources, more expensive prisons inevitably mean less use of imprisonment, blunting the effectiveness of a measure that has already reduced crime substantially and promises to do more in the future. Such a result is contrary to the interests of victims of crime and the law-abiding public, which CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Plaintiff (respondent in this Court) Milton Ash is a Security Officer for the Alabama Department of Youth Services. Among his allegations is a claim that he was diagnosed with sleep apnea, his doctor recommended that he work the day shift, Joint Appendix (J. A.). 8-9, and that while other officers were placed in the first shift, he was not. *Id.*, at 9.

Plaintiff filed suit against the Department in Federal District Court, alleging violations of numerous federal statutes, including the Americans with Disabilities Act (ADA). The District Court granted summary judgment for the Department on the ADA claim, deciding Ash's case together with another case presenting similar issues. The Eleventh Circuit reversed, holding that the ADA was a valid exercise of the Enforcement Clause of the Fourteenth Amendment and that states do not have Eleventh Amendment sovereign immunity. See *Garrett* v. *University of Alabama*, 193 F. 3d 1214, 1218 (CA11 1999). This holding was based on the Court of Appeals' then-binding precedent in *Kimel* v. *State Bd. of Regents*, 139 F. 3d 1426, 1433 (CA11 1998), subsequently reversed, 528 U. S. __, 145

L. Ed. 2d 522, 120 S. Ct. 631 (2000). On April 17, 2000, this Court granted the Department's certiorari petition, limited to the issue of the state's Eleventh Amendment immunity from the ADA claims.

SUMMARY OF ARGUMENT

The Americans with Disabilities Act, as applied to state prisons, is a massive federal intrusion into the single most important function of state government: the protection of its citizens from crime. If enforced, it will dictate the allocation of state resources in a manner which may not be in the best interests of the people of the state as a whole, and, more importantly, it will separate the decision-making authority from the elected officials accountable to the people and vest it in the federal judiciary and bureaucracy.

Notwithstanding Congress's declaration, "individuals with disabilities," as sweepingly defined by the ADA, are not a "discrete and insular minority," or even a recognizable class at all. While a more focused definition might have qualified for that designation, the protected class *as actually defined* has not been the target of the kind of discrimination that has warranted major congressional intervention in the operations of state government.

The ADA is not a valid exercise of Congress's Fourteenth Amendment enforcement power. Constitutional violations are a minuscule subset of government decisions that would be actionable under ADA. The Act fails the congruence and proportionality test by a wide margin. Hence, Congress had no authority to abrogate the state's Eleventh Amendment immunity.

ARGUMENT

I. As applied to state correctional facilities, the ADA is a massive federal intrusion into a core state government function.

"[T]he suppression of [violent crime] has always been the prime object of the state's police power . . . ." *United States* v. *Morrison*, 529 U. S. __ (No. 99-5, May 15, 2000) (slip op., at 15). To the extent that the Americans with Disabilities Act (ADA) burdens the states correctional facilities, it does not merely impact *a* core state government function, it impacts *the* core state government function.

The burden the ADA places on state correctional facilities will, we understand, be described in the brief of *amicus* Association of State Correctional Administrators, and *amicus* CJLF will not duplicate that discussion here. We will, however, note a few of the more troubling applications of ADA from the standpoint of separation of powers and federalism.

Parole is a vitally important decision in the management of the prisons. "[T]he choice involves a synthesis of record facts and personal observation filtered through the experience of the decisionmaker and leading to a predictive judgment as to what is best both for the individual inmate and for the community." *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 8 (1979). This is the quintessential discretionary decision entrusted to the executive branch of state government. Whatever minimal requirements the judiciary may impose on the process of making this decision, see *id.*, at 16, it would be preposterous to assert that judges, especially federal judges, are empowered to dictate the criteria of the decision.

Two centuries ago, it was "scarcely necessary for the court to disclaim all pretension to . . . jurisdiction . . . to inquire how the executive, or executive officers, perform duties in which they have a discretion." *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137, 170 (1803). Regrettably, respect for federalism and

the separation of powers has sunk so low that it is very necessary today.

In *Bogovich* v. *Sandoval*, 189 F. 3d 999 (CA9 1999), prison inmates claimed that "considering a prisoner's substance abuse history when making parole decisions violates Title II of the ADA." *Id.*, at 1001. Based on the considerations set forth in *Greenholtz* and *Marbury*, one would expect that such a request for federal judicial intrusion into a core, discretionary state executive function would be promptly and emphatically rejected. Unbelievably, this case remains mired in litigation *four years* after it was filed.

Pennsylvania Dept. of Corrections v. *Yeskey*, 524 U. S. 206 (1998) provides another example. Yeskey challenged his exclusion from a "boot camp" program, which was a decision the prison administrators made in the good-faith belief he was medically unsuited for the program. See *id.*, at 208. As our society continues its long, so-far largely fruitless quest to find corrections programs which actually correct, it is essential that we be able to experiment, innovate, and see what works. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Pennsylvania Dept. of Corrections* v. *Yeskey*, No. 97-634, p. 20; Mackenzie, et al., Boot Camp Prisons and Recidivism in Eight States, 33 Criminology 327, 353-354 (1995). If every suitability determination in every innovative program involving any of the breathtaking sweep of conditions that arguably qualify as "disabilities" under the ADA triggers a federal lawsuit, it is easy to see how administrators with limited resources may well conclude that the price of innovation is just too high. Although we are informed that the state did eventually prevail on remand in *Yeskey*, the damage is done by the litigation itself. See *Puerto Rico Aqueduct and Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U. S. 139, 145 (1993).

Finally, there is the present case, *Alabama Dept. of Youth Services* v. *Ash*. Correctional facilities must be staffed around the clock. Shift work is undesirable, to put it mildly. The period from midnight to 8:00 a.m. is not called the "graveyard

shift" for nothing. See American Heritage Dictionary 791 (3d ed. 1992).

Assignment of personnel to shifts involve many considerations. Seniority rights, collective bargaining agreements, rewarding good performance, accommodating working parents, and keeping a mix of experienced personnel with rookies on all shifts are a few of the important considerations.

Respondent Milton Ash, a Security Officer with Alabama Department of Youth Services was diagnosed with sleep apnea, and his doctor recommended he work the day shift. See Complaint (Ash) ¶ 9, J. A. 8-9. Ash further alleges that other officers were placed in the first shift, but he was not. *Id.*, ¶ 11, J. A. 9. He does not allege that the administration did not have valid management reasons for their decision. The claim, in essence, is that under the ADA accommodating Ash's "disability" automatically trumps all other considerations, or, at the very least, subjects this elementary management decision to second-guessing by an unelected and unaccountable federal judge, who has no responsibility for the adverse consequences of elevating one person's interests above everyone else's.

However well intended, the ADA does grave damage to the careful and intricate separations of powers created by the Constitution. It subjects to judicial scrutiny the most basic questions vested in the discretion of executive officers. It federalizes issues which properly belong to state and local government. Intrusion of this magnitude can be "appropriate," within the meaning of the Civil War Amendments' enforcement clauses, when necessary to correct a major, pervasive, and long-standing violation of the Constitution. The most notorious example is the 75-year *de facto* nullification of the Fifteenth Amendment in an entire region of the country. See *South Carolina* v. *Katzenbach*, 383 U. S. 301, 310-314 (1966). Nothing remotely approaching that has occurred in relation to the ADA. The magnitude of the intrusion is not proportional to any pattern of violation of the Constitution.

II. As sweepingly defined by the ADA, "individuals with disabilities" defines a class which is neither discrete nor insular.

Past cases on the scope of Congress's Fourteenth Amendment enforcement power have noted Congressional findings of constitutional violations, or the lack or weakness of such findings, to bolster the arguments for or against a particular exercise of the power. See *City of Boerne* v. *Flores*, 521 U. S 507, 530-532 (1997) (contrasting records in Religious Freedom Restoration Act and Voting Rights Act). In the ADA, Congress included the following finding:

"The Congress finds that— . . .

> "(7) individuals with disabilities are *a discrete and insular minority* who have been faced with restrictions and limitations, subjected to a history of *purposeful* unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society. . . ." 42 U. S. C. § 12101(a)(7) (emphasis added).

The phrase "discrete and insular minority" is an obvious allusion to the famous footnote in *United States* v. *Carolene Products Co.*, 304 U. S. 144, 153, n. 4 (1938) and clearly intended to shore up a shaky equal protection basis for the statute. The findings of Congress are, of course, entitled to great respect. They are not, however, entitled to unquestioning acceptance. If they were, the very purpose of having a written constitution would be subverted. "To what purpose are [Congress's] powers limited, and to what purpose is that limitation committed to writing, if the limits may at any time, be passed by those intended to be restrained?" *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137, 176 (1803). The Fourteenth

Amendment grants powers to Congress, while the inherent federal structure confirmed by the Tenth Amendment reserves powers to the states. If Congress can shift the line between the two simply by making findings based on power rather than reality, the federal structure collapses, and the United States become the Consolidated State.

For doubt that finding (7) is valid if applied to the Act's sweeping definition of "disability," we need look no further than finding (1), which includes "some 43,000,000 Americans" in the category. That would be about one-sixth of the population. See U. S. Dept. of Commerce, Statistical Abstract of the United States 1997, p. 21 (1997) (1990 population was 248,718,000). Outside the unique context of race, it staggers the imagination that a group that large could really be "discrete and insular" within the meaning of *Carolene Products.*

"Discrete" means "constituting a separate thing, distinct." American Heritage Dictionary 532 (1992). "Insular" means, in the sense that fits this context, "suggestive of the isolated life of an island." *Id.*, at 936. A "discrete and insular minority," therefore, refers to a group segregated from the mainstream of American society and not participating in it.

Without question, there are small subsets of the set of "individuals with disabilities" who did, at one time at least, fit that description. Certain categories of mental illnesses and impairments, including schizophrenia and retardation, have in times past been subject to the kinds of stigma and isolation that this term implies. See *Cleburne* v. *Cleburne Living Center*, 473 U. S. 432, 461-464 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part). An act addressed to remedy the injustices against a class so defined might fall within the power of Congress under section 5 of the Fourteenth Amendment. The ADA bears little resemblance to such an act.

To illustrate the reality of ADA litigation, let us survey the conditions asserted as "disabilities" by the plaintiffs in the ADA cases in which this Court has granted certiorari. These cases

include the conditions of high blood pressure, *Pennsylvania Dept. of Corrections* v. *Yeskey*, 524 U. S. 206, 208 (1998); *Murphy* v. *United Parcel Service, Inc.*, 527 U. S. 516, 518 (1999), asymptomatic AIDS, *Bragdon* v. *Abbott*, 524 U. S. 624, 628 (1998), an injured heel and back, *Wright* v. *Universal Maritime Service Corp.*, 525 U. S. 70, 74 (1998), complications from a stroke, *Cleveland* v. *Policy Management Systems Corp.*, 526 U. S. 795, 798 (1999), severe myopia, *Sutton* v. *United Air Lines, Inc.*, 527 U. S. 471, 475 (1999), amblyopia, *Albertson's, Inc.* v. *Kirkingburg*, 527 U. S. 555, 559 (1999); *Alsbrook* v. *City of Maumelle*, 184 F. 3d 999, 1002 (CA8 1999), cert. dismissed, 146 L. Ed. 2d 215 (2000), mental retardation, schizophrenia, and "personality disorder," *Olmstead* v. *L. C.*, 527 U. S. 581, 593 (1999), a heart condition, *Florida Dept. of Corrections* v. *Dickson*, 145 L. Ed. 2d 1131 (2000) (dismissing cert.); see L. Greenhouse, Supreme Court Will Revisit States' Rights Bias Case, N. Y. Times, Jan. 22, 2000, p. A12, col. 5, and breast cancer, asthma, and sleep apnea, in the present case.

These cases illustrate that the scope of conditions which have been the subject of ADA litigation has vastly exceeded any conceivable definition of "discrete and insular minorities." To be sure, the situation has been considerably improved by the exclusion of correctable conditions in *Sutton*. See 527 U. S., at 494-495 (Ginsburg, J., concurring). Even so, the conditions which remain the subject of ADA litigation remain far beyond the previously stigmatized and isolated conditions that might have warranted Congress's finding.

Could anyone seriously argue that persons whose vision can only be corrected to 20/30, rather than 20/20, see *Alsbrook*, *supra*, 184 F. 3d, at 1002, have been the objects of widespread discrimination, isolation, and stigmatization by society? Have persons with sleep apnea been disenfranchised and rendered politically powerless? Have persons with high blood pressure, see *Yeskey*, *supra*, 524 U. S., at 208, been denied participation in the mainstream of American life?

Of all the plaintiffs in these cases only three (L. C. and E. W. with retardation and schizophrenia and Abbott with a dreaded, contagious disease) have the kinds of conditions that have been subject in the past to the kind of invidious discrimination that would even arguably give rise to a claim of constitutional violation. *Cleveland* demonstrates the exact opposite. Plaintiff in that case was the beneficiary of a generous system of public assistance set up to assist the disabled decades before the ADA. See 526 U. S., at 797, 801. Other examples of governmental good will toward the disabled abound. See, *e.g.*, 26 U. S. C. § 63(f)(2) (additional income tax exemption for the blind).

"Individuals with disabilities" within the meaning of the ADA is not even a recognizable category in society outside the context of the Act. If one were to describe the above plaintiffs' conditions to the proverbial person on the street and ask how many of them are "disabled," the answer would be less than half. How can Congress credibly declare a group of people a "discrete and insular minority" when Congress itself has created the group by lumping together people who would not ordinarily be considered members of any recognizable set?

Notwithstanding the respect and deference generally due to Congress, the finding in 42 U. S. C. § 12101(a)(7) is patently false. The class of persons to whom the ADA applies is not a "discrete and insular minority" and has not been the subject of "purposeful unequal treatment."

III. The ADA is not a valid exercise of Congress's Fourteenth Amendment enforcement power.

Section 5 of the Fourteenth Amendment confers upon Congress the power to enforce the Amendment by appropriate legislation. That section did not authorize the destruction of the federal system and its replacement by a unitary government, with the state as mere departments. See *City of Boerne* v. *Flores*, 521 U. S. 507, 520-524 (1997). When the ink was

barely dry on the Amendment's ratification, this Court declared, "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas* v. *White*, 7 Wall. (74 U. S.) 700, 725 (1869), overruled on other grounds, *Morgan* v. *United States*, 113 U. S. 476, 496 (1885). Section 5 of the Fourteenth Amendment did not change that.

Everyone can agree that the accommodation of disabled persons and their access to government programs is a desirable goal. The worthiness of the goal, however, does not justify the means. Indeed, the first statute ever declared unconstitutional by federal judges was a highly commendable act for the relief of disabled veterans of the American Revolution and the widows and orphans of those who had fallen. Understandably, the judges were somewhat embarrassed in announcing their decision that Congress had violated the separation of powers in its choice of means to implement this salutary law, but announce it they did. See *Hayburn's Case*, 2 Dall. (2 U. S.) 409, 410-411, n. (a) (1792) (describing circuit decisions).

So it is in this case. If Congress had really intended that all prisoners and prison employees be fully accommodated and mainstreamed for all disabilities, sweepingly defined, it could unquestionably have done so under the spending power by providing the necessary funds and conditioning receipt on compliance with certain standards. See *South Dakota* v. *Dole*, 483 U. S. 203, 212 (1987) (constitutionality of such statutes); *Board of Ed. of Hendrick Hudson Central School Dist.* v. *Rowley*, 458 U. S. 176, 179 (1982) (describing Education of the Handicapped Act). Instead, the ADA invokes the Fourteenth Amendment and the commerce power, see 42 U. S. C. § 12101(b)(4), and hands the bill to the states. Neither of these powers supports the application of the ADA to state prisons. The present case involves only the Fourteenth Amendment; the Commerce Clause question must await another case. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Pennsylvania Dept. of Corrections* v. *Yeskey*, No. 97-634, pp. 16-20 (Commerce Clause argument).

The most straightforward, and least controversial, use of the Fourteenth Amendment enforcement power is to provide remedies to give practical effect to the substantive guarantees. For example, the Fourteenth Amendment, by its own force, forbids racial discrimination in selecting juries, see *Strauder* v. *West Virginia*, 100 U. S. 303, 308 (1880), but only Congress can make such discrimination a crime and punish it. See 18 U. S. C. § 243; *Ex parte Virginia*, 100 U. S. 339, 345-346 (1880); cf. *Liparota* v. *United States*, 471 U. S. 419, 424 (1985) (no federal common law crimes). The difficult question arises when Congress purports to prohibit a state government practice which does not violate the Fourteenth Amendment.

Katzenbach v. *Morgan*, 384 U. S. 641 (1966) was once thought to stand for the proposition that Congress could expand the protections of the Fourteenth Amendment beyond the substantive reach of the Amendment itself. That case involved a statute in which Congress had provided that persons educated in "American-flag schools" in languages other than English could vote, notwithstanding state English-literacy requirements. *Id.*, at 643.

The Court upheld the statute, thereby permitting Puerto Ricans to register to vote in New York, even if they could not read English. This result was reached without overruling a precedent that had upheld literary tests as a general matter. *Id.*, at 649. On its facts, this seems an unobjectionable result. The act involved the right to vote on a ground related to ethnicity. While literacy tests may be generally valid, Congress determined that in this limited situation those laws operated in practice to disenfranchise an ethnic group in violation of the Fifteenth Amendment.[2] That judgment was not necessarily inconsistent with that general rule.

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2. Puerto Ricans are, of course, not a "race" as that term is used today. In the Reconstruction era, though, the word "race" was used to refer to smaller groups. See *Saint Francis College* v. *Al-Khazraji*, 481 U. S. 604, 610-611 (1987).

The *Morgan* majority, however, used sweeping language "which could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment." *City of Boerne*, *supra*, 521 U. S., at 527-528. Subsequent cases have not followed that interpretation of *Morgan*.[3]

Oregon v. *Mitchell*, 400 U. S. 112 (1970) sounded the retreat. The Court was badly splintered, and only Justice Black concurred in all four of the Court's separate holdings. The issue most pertinent to the present question was Congress's attempt to lower the voting age to 18 in state elections, as well as federal, thus invading the traditional power of the state to regulate its own elections.

Justice Black interpreted the Fourteenth Amendment as giving Congress authority to regulate in this area only to prevent racial discrimination. *Id.*, at 130. Justice Harlan expressly rejected the "notion of deference to congressional interpretation of the Constitution, which the Court promulgated in *Morgan* . . . ." *Id.*, at 209 (opinion concurring in part and dissenting in part). The provision's "validity therefore must rest on congressional power to lower the voting age as a means of preventing *invidious discrimination that is within the purview of [the Equal Protection] clause*." *Id.*, at 212 (emphasis added). Justice Stewart, joined by Chief Justice Burger and Justice Blackmun, took a narrower view of *Morgan*. They understood that it had merely upheld Congress's determination that there had been actual discrimination against Puerto Ricans in New York, an Equal Protection violation by any standard, and that the extension of the vote was the remedy for this

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3. "The broad language in *Morgan*, purporting to give Congress power to define equal protection, was unnecessary to the decision of the case. The Court's language appears to be an alternative holding rather than dictum, but subsequent decisions show that the Court has retreated from the more far-reaching implications of *Morgan*." 4 R. Rotunda & J. Nowak, Treatise on Constitutional Law § 19.3, p. 8 (3d ed. 1999).

violation. *Id.*, at 295-296 (opinion concurring in part and dissenting in part).

Viewed through the retrospective lens of *Marks* v. *United States*, 430 U. S. 188, 193 (1977), the opinion concurring on the "narrowest grounds" is probably Justice Stewart's. Congress has the power "to provide the means of eradicating situations that amount to a violation of the Equal Protection Clause . . . ." *Mitchell*, *supra*, 400 U. S., at 296 (concurring in part). It does not have the power "to determine as a matter of substantive constitutional law what situations fall within the ambit of the clause . . . ." *Ibid.* To the extent *Morgan* may have been contrary, it did not survive *Mitchell*.

The other relevant holding of *Mitchell* involved Congress's temporary suspension of all literacy tests for voting nationwide. Given the sorry history of the racially discriminatory use of these tests to violate the very core of the Fifteenth Amendment, the Court had little trouble in agreeing unanimously that this was a proper exercise of Congress's enforcement power under that amendment. *Id.*, at 118, 132 (opinion of Black, J.). This included the *Morgan* dissenters. *Id.*, at 216 (opinion of Harlan, J.); *id.*, at 282-283 (Stewart, J., concurring in the judgment).

Taken together, these opinions indicate that before the enforcement power of Congress can apply there must first be a violation of the substantive requirements of the Fourteenth or Fifteenth Amendments. Where there are substantial violations, a remedy that sweeps in some nonviolations may be necessary. The problem of literacy tests provides a good example. Litigating each application of the tests to determine if it is discriminatory would be impractical, leaving the choice between tolerating large-scale violations of the Fifteenth Amendment or sweeping out some good-faith, nondiscriminatory uses of the tests along with the bad-faith uses.

The voting age question provides a clear counterexample. The 21-year-old voting age did not serve as an instrument for evading the Constitution. These clearly constitutional, if

possibly unwise, statutes did not produce *de facto* constitutional violations on a large scale by burdening people deprived of their rights with case-by-case litigation. If these laws produced any constitutional violations at all, which is doubtful, the "remedy" included within its sweep vastly more constitutional applications than unconstitutional applications.

Twenty-seven years later, the question that fractured the Court in *Mitchell* produced not a single dissent in *City of Boerne* v. *Flores*, *supra*. The question was whether Congress had the authority to forbid actions of state and local government that were constitutional under the Free Exercise Clause as construed in *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990), but which would have violated the rule of *Sherbert* v. *Verner*, 374 U. S. 398 (1963), abandoned in *Smith*.[4] The only dissents were on the ground that *Smith* should be reconsidered. *City of Boerne*, *supra*, 521 U. S., at 545 (O'Connor, J., dissenting); *id.*, at 565-566 (Souter, J., dissenting); *id.*, at 566 (Breyer, J., dissenting). Justice O'Connor largely agreed with the majority on the Congressional power question, *id.*, at 545-546, and Justice Breyer agreed in part. *Id.*, at 566. Justice Souter took no position on the point. *Id.*, at 565-566.

City of Boerne confirmed, in a coherent majority opinion, the same conclusion that must be extracted from the splintered opinions in *Oregon* v. *Mitchell*. The power of Congress is remedial, not substantive. 521 U. S., at 527. "While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved." *Id.*, at 530. The "congruence and proportionality" test is now solidly established. See *Kimel* v. *Florida Bd. of Regents*, 528 U. S. ___, 145 L. Ed. 2d 522, 541, 120 S. Ct. 631, 645 (2000).

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4. Congress's Fourteenth Amendment enforcement power is involved because the Free Exercise Clause is deemed to be incorporated in the Due Process Clause. See *City of Boerne*, 521 U. S., at 519.

In a sense, the problem of "appropriate legislation" under section 5 of the Fourteenth Amendment mirrors the problem of equal protection under section 1. It is a question of legislative classification. A classic law review article used set theory to explain the problem. See Tussman & tenBroek, The Equal Protection of the Laws, 37 Cal. L. Rev. 341, 347 (1949); see also 4 R. Rotunda & J. Nowak, Treatise on Constitutional Law § 18.2, pp. 209-211 (3d ed. 1999). The legislation aims at some mischief (M) and applies to all persons with some trait (T). If the sets T and M are identical, the law is perfectly reasonable. If they are entirely separate, it is irrational. If T is a subset of M, the law is underinclusive, but this is generally not a problem. If M is a subset of T, the law is overinclusive. It applies to people who do not present the problem at which the law is aimed. That can be an equal protection violation.

Mitchell, *Boerne*, and *Kimel* are analogous. Congress cannot be expected to match its remedies precisely to constitutional violations. A rule that Congress can never forbid any state practice that does not violate the Fourteenth Amendment would force Congress to always be seriously underinclusive. However, an act which is vastly overinclusive cannot stand. Congress cannot throw out a whole nursery full of babies to dispose of a few ounces of bath water.

Assuming *Smith* to be correct, as we must unless and until this Court overrules it,[5] the act in *Boerne* was "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne*, *supra*, 521 U. S., at 532. "Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." *Ibid.*

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5. See *Brown* v. *Allen*, 344 U. S. 443, 540 (1953) (Jackson, J., concurring in the judgment).

These words could just as easily have been written about the ADA. Every agency at every level of government must reexamine every program and decide whether to make modifications and provide the necessary "auxiliary aids and services" to accommodate a wide variety of disabilities. See 42 U. S. C. § 12131(2). If they cannot afford to do so, then they must terminate the program. In the case of prisons, where programs to benefit prisoners are under heavy assault already,[6] termination may very often be the choice.

Cleburne v. *Cleburne Living Center*, 473 U. S. 432 (1985) established that mental retardation is not a "quasi-suspect classification" for the purpose of equal protection analysis. *Id.*, at 446. The test for differential treatment is therefore whether the distinction is "rationally related to a legitimate governmental purpose." *Ibid.* For the reasons stated in *Cleburne*, the same rule should apply to the disabled generally.[7]

First, unlike race, disability is often relevant. Cf. *Cleburne*, 473 U. S., at 442-443. The most common reason for a refusal to make an accommodation is simply an unwillingness to spend the extra money required. See, *e.g.*, *University of Texas* v. *Camenisch*, 451 U. S. 390, 392 (1981); *id.*, at 398-399 (Burger, C.J., concurring) (issue was not whether Camenisch could attend, but merely who would pay the additional expense). Expense would only be irrelevant in a program with unlimited resources. In the real world, expense is always relevant. Cf. *Kimel*, *supra*, 145 L. Ed. 2d, at 543, 120 S. Ct., at 646 (noting that age classification is generally relevant and rational).

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6. For example, H. R. 667 § 401, passed by the House in the 104th Congress, would have removed all strength-training activities from federal prisons. It is not difficult to see how a lawsuit demanding accommodation in such a program, and the attendant expense, would be the last straw.

7. The author of a treatise on the subject, who generally takes an expansive view of rights of the disabled, concurs with this assessment. See L. Rothstein, Disabilities and the Law § 1.02, pp. 9-10 (1997).

Second, the steady stream of legislation to benefit the disabled negates any notion that the disabled are the kind of politically powerless minority in special need of judicial protection from legislative animosity. Cf. *Cleburne*, *supra*, 473 U. S., at 443-445.[8] Indeed, the disabled seem to have a unique capacity to get Congress to act swiftly in reaction to any adverse decision from this Court. *Smith* v. *Robinson*, 468 U. S. 992, 1021 (1984), which denied attorney's fees under the Education of the Handicapped Act (EHA), was abrogated only two years later. See 20 U. S. C. § 1415(i)(3)(B), formerly subd. (e)(4)(B). *Dellmuth* v. *Muth*, 491 U. S. 223, 232 (1989) held, as a matter of statutory construction, that Congress had not intended to abrogate Eleventh Amendment immunity in the EHA. Congress abrogated the specific holding of *Dellmuth* the next year. Pub. L. No. 101-476, 104 Stat. 1103, 1106 (1990).[9] *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234 (1985) met the same fate on the same point regarding the Rehabilitation Act. Pub. L. No. 99-506, 100 Stat. 1807 (1986).[10]

Other groups can only gaze upon this astonishing record of legislative triumph with envy. It took victims of crime *43 years* to correct the misinterpretation of the federal habeas corpus statute. Compare *Brown* v. *Allen*, 344 U. S. 443, 499 (1953) (Frankfurter, J., concurring), with *Williams (Terry)* v. *Taylor*, 529 U. S. ___, 146 L. Ed. 2d 389, 430 (2000) (construing new 28 U. S. C. § 2254(d)).

Congress's declaration that the disabled are "relegated to a position of political powerlessness," 42 U. S. C. § 12101(a)(7), is far from self-validating. Indeed, it is close to self-negating.

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8. This point combines the *Cleburne* Court's second and third points.

9. Whether Congress actually had the authority to abrogate is another question, closely related to the question in the present case.

10. There are many other statutes benefitting the disabled, of course. The history is described in Rothstein, *supra*, at 3-19.

Any group with enough clout to convince Congress to declare it "powerless," in an obvious attempt to overturn one of this Court's precedents, is powerful indeed.

Cleburne's final point was that if the mentally retarded were accorded "quasi-suspect" status, a wide variety of other groups would be as well. 473 U. S., at 445-446. The *Cleburne* Court stated it was unwilling to do so. *Id.*, at 446. The obvious reason is that such a step would vastly increase judicial scrutiny of legislative decisions, with a corresponding abridgment of the people's right of self-government. If small subsets of the "disabled" that actually have been targets of discrimination are not "quasi-suspect," then clearly the vastly broader class defined by the ADA is not. State action regarding this class is constitutional if it passes the rational basis test.

Applying the rational basis test, saving money, is *always* a legitimate state interest. If more money is spent on a program, it must be either cut from another program, drained from the general economy through a tax increase, or borrowed so as to encumber the future.[11] Of course, a state cannot save money by arbitrarily cutting off a disfavored group which is not distinguishable on any basis relevant to that goal. See *Plyler* v. *Doe*, 457 U. S. 202, 229 (1982) (exclusion of "undocumented" children from school). Where the higher cost of including a particular person is the very essence of the classification, though, it cannot be seriously contended that the distinction is not rationally related to the legitimate purpose.

Obviously, the requirement to modify practices and provide "auxiliary aids and services," 42 U. S. C. § 12131(2); *id.*, § 12132, sweeps vastly further than the Equal Protection Clause. The over inclusiveness of this law is as great or greater than those in *City of Boerne* and *Kimel*. Under those prece-

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11. The federal government has a fourth option: print paper money. The states do not. U. S. Const., Art. I, § 10, cl. 1.

dents, this statute cannot be an exercise of Congress's enforcement power under the Fourteenth Amendment.

Unlike the Religious Freedom Restoration Act, though, this statute does not fall, at least not in its entirety, when the Fourteenth Amendment support crumbles. Most of the statute in most of its applications, *e.g.*, to businesses in interstate commerce, is a valid exercise of the commerce power. The abrogation of Eleventh Amendment immunity, though, does depend on the Act's Fourteenth Amendment basis. *Kimel*, *supra*, 145 L. Ed. 2d, at 539-540, 120 S. Ct., at 643-644. The federal courts have no jurisdiction to hear this case.

CONCLUSION

The decision of the Court of Appeals for the Eleventh Circuit should be reversed.

June, 2000

Respectfully submitted,

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Supreme Court, U.S.
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In The
Supreme Court of the United States

THE UNIVERSITY OF ALABAMA AT BIRMINGHAM, BOARD OF TRUSTEES, ET AL.

Petitioners,

v.

PATRICIA GARRETT, ET AL.,

Respondents.

On Writ of Certiorari
To The United States Court of Appeals
for the Eleventh Circuit

BRIEF FOR AMICI CURIAE LAW PROFESSORS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI

Amici are law professors with extensive experience in the study of constitutional law, the history of the Fourteenth Amendment and the jurisdiction of the federal courts.[1] Amici have no personal interest in the outcome of this litigation, but are deeply concerned with the development of jurisprudence regarding the respective roles played by the coordinate branches of federal government in protecting the civil rights of the people of the United States. Amici are also concerned as scholars and citizens with the role of the federal government in the correction of State discrimination against certain classes of people. A list of amici is attached to this brief as Appendix I.

SUMMARY OF ARGUMENT

The text and history of the Fourteenth Amendment make clear that its framers intended to vest in Congress the plenary power to remedy all forms of unconstitutional discrimination. The framers designed this authority fully cognizant that it would often be exercised at the expense of "state's rights" or "state sovereignty." History indicates as well that the "equal protection of the laws" manifested both a promise and a command: as a promise, it was to extend to all classes of persons, not merely those that would today be considered "suspect" or "quasi-suspect" classes; as a command, it forbade denials of equal protection, imposing an obligation on the states to

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[1] All parties consent to the filing of this brief. Counsel for neither party authored the brief in whole or in part. No person or entity made a monetary contribution to the brief's preparation or submission.

refrain from invidious discrimination and to ensure that state laws were administered with actual equality, rather than the sham represented by statutes ignored in practice. Finally, history indicates that to secure this promise and to enforce this command, Congress was necessarily vested with the affirmative power to enact comprehensive legislation preventing or remedying state denials of equal protection, including both state discrimination and state failures to protect against discrimination.

The Americans with Disabilities Act represents the culmination of more than twenty years of Congressional efforts to end State discrimination against people with disabilities through a variety of subsidies, restrictions and mandates in discrete areas such as education, transportation, voting, housing and institutional care. In enacting the ADA, Congress was explicit in its findings that these statutes had failed, and that discrimination (including discrimination by the States) was pervasive and nation-wide. Even so, the ADA itself was a product of several years of negotiation and compromise, the very kind of consultation and fact-gathering suggested by this Court in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 442-43 (1985).

As the Court recognized in *City of Cleburne*, and other cases, discrimination based on disability, although potentially as arbitrary and irrational as other forms of discrimination, requires a different legal approach than other forms of discrimination. Developing the structure for remediation of disability-based discrimination is a particularly inappropriate task for courts (a conclusion reflected in the Court's choice of rational basis level of scrutiny) and

particularly suited to legislative bodies (making deference to Congress in the development of the ADA particularly appropriate). In fact, discrimination against people with disabilities, both pervasive and complex, is a classic example of the sort of "difficult and intractable problem" identified by this Court in *Kimel v. Board of Regents*, 120 S.Ct. 631, 648 (2000) as justifying prophylactic measures aimed at preventing unconstitutional behavior.

Despite this Court's recent references to the deference due to Congress about the need for remedial legislation to protect the rights of citizens under the Fourteenth Amendment, State litigants have interpreted *Kimel* and *City of Boerne v. Flores*, 521 U.S. 507 (1997) as an invitation to dismantle almost fifty years of federal civil rights legislation. States are now questioning their obligation to follow virtually every civil rights enactment that Congress has ever passed, from Title VII to the Voting Rights Act. The Court has now firmly established that Congress may neither reverse Supreme Court interpretations of constitutional rights nor act to abrogate State immunity without a sufficient record of unconstitutional discrimination. In the case of the Americans with Disabilities Act, both requisites have been satisfied, and the Court should uphold Congress' exercise of its Section 5 powers.

I. *The Americans with Disabilities Act is Consistent with the Original and Historical Understanding of the Scope of Congressional Power under Section Five of the Fourteenth Amendment.*

A. *The Framers of the Fourteenth Amendment Intended to Vest Congress*

with Plenary Powers to Remedy State Discrimination.

1. *The History of Section Five.*

On February 26, 1866, Republican Congressman John Bingham of Ohio reported to the House of Representatives a proposed Amendment to the Constitution, drafted by the Joint Committee on Reconstruction, the "Committee of Fifteen." This initial iteration of what would eventually be the Fourteenth Amendment to the Constitution provided as follows:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.

Cong. Globe, 39th Cong., 1st Sess. 1034 (1866). After three days of debate, the proposal was tabled until April, Bingham voting with the rest of the Republican majority in favor of the postponement. *Id.* at 1095. It is generally agreed that the decision to table by Bingham and his Republican allies represented something of a strategic retreat; in its initial form, the proposed Amendment had little chance of commanding the necessary two-thirds majority. *See, e.g.,* BENJAMIN KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 215 (1914). It is also generally understood that the nominal reason for at least some of the opposition to the proposal was the

fear that it would unduly centralize power. *See, e.g., City of Boerne*, 521 U.S. at 521-25.

The defeat of the original Bingham proposal, however, is not fairly reduced to a simple matter of state versus federal power. Some of the Republicans who voted to table the proposal were, like Bingham, supporters of the measure.[2] Some Republicans who opposed the measure thought that it did not go far enough, *see* Cong. Globe, 39th Cong., 1st Sess. 1095 (1866) (statement of Rep. Hotchkiss). Finally, some Republicans were simply of the view that the Amendment was unnecessary; they were convinced that the Constitution already authorized congressional acts designed to secure equality under law, *see* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 253 (1988), a proposition that Bingham--in a distinct minority among Republicans--would not embrace. *See, e.g.,* Cong. Globe, 39th Cong., 1st Sess. 1291 (1866). Democratic opposition to the measure, meanwhile, also transcended the simple opposition of state and federal power[3], and was in any event the identical argument that would be made in opposition

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[2] *See, e.g.,* Cong. Globe, 39th Cong., 1st Sess. 1054 (1866) (statement of Rep. Higby); *id.* at 1057 (statement of Rep. Kelley); *id.* at 1088 (statement of Rep. Woodbridge); *id.* at 1095 (statement of Rep. Bingham).

[3] The one Democrat to be heard at length on the bill was Congressman Andrew Rogers of New Jersey, a member of the Committee of Fifteen. Rogers did indeed object to the proposal on the grounds that it centralized power. *See* Cong. Globe, 39th Cong., 1st Sess. App. 134 (1866). However, the heart of the matter might have been the litany of social horrors Rogers perceived in the Bingham proposal: "under this amendment a negro might be allowed to marry a white woman . . . Under this amendment, Congress would have power to compel the State to provide for white children and black children to attend the same school . . ." *Id.* See also id. at 2080-81 (statement of Rep. Nicholson).

to the final iteration of the Fourteenth Amendment. *See* Cong. Globe, 39th Cong., 1st Sess. 2538 (1866); *id.* at App. 134. *See also id.* at 2080-81.

Interestingly, the opponents and defenders of the initial Bingham proposal found some common ground on this score: it was no valid objection to the amendment to interpose a claim of "state sovereignty." Congressman Woodbridge defended the amendment against the charge that it abridged this elusive "state sovereignty": "It does not destroy the sovereignty of a State, if such a thing exists. It does not even affect its sovereign rights, but merely keeps whatever sovereignty it may have in harmony with a republican form of government and the Constitution of the country." *Id.* at 1088. *See also id.* (statement of Cong. Hale).

The modified proposal that emerged from the Joint Committee in April--the material terms of which were also largely the work of Congressman Bingham--looked very much like the more "radical" proposal suggested by Congressman Hotchkiss, *see id.* at 1095: it secured the substantive rights by constitutional provision and gave to Congress the power to enforce those rights. *Id.* at 2286.

Democratic opposition to the modified amendment remained uniform--no Democrat in either body voted for the measure--and, typically, much of it was expressed in the rhetoric of "state's rights." *See, e.g., id.* at 2530 (statement of Rep. Randall); *id.* at 3147 (statement of Rep. Harding); *id.* at 2940 (statement of Sen. Hendricks); *id.* at App. 240. The opposition to Section Five was hardly surprising. As Bingham would later explain, the grant of power to

Congress envisioned by Section Five matched and exceeded the grant envisioned in his original proposal:

> [Section Five's] grant of power . . . is full and complete. The gentleman [Rep. Farnsworth] says that amendment differs from the amendment reported by me in February; differs from the provision introduced by me, now in the fourteenth article of amendments. It differs in this: that it is, as it now stands in the Constitution, more comprehensive than as it was first proposed and reported in February, 1866. It embraces all and more than did the February proposition...

Cong. Globe, 42d Cong., 1st Sess. App. 83 (1871). *See also id.* at 84. *Cf.* KENDRICK, JOURNAL OF THE JOINT COMMITTEE at 311 n. 2.

Supporters of the Amendment, meanwhile, were also well aware that the revised Amendment would significantly alter the existing balance of state and federal power, substantially increasing the latter, at times at the expense of the former. Section Five was a vital part of the project, *see, e.g.,* Cong. Globe, 42d Cong., 1st Sess. 257 (1871) (statement of Rep. Baker) ("This section was of course necessary in order to carry the proposed article into practical effect."). As Senator Howard explained to the Senate in his introduction of the measure, Section Five gives Congress "authority to pass laws which are appropriate to the attainment of the great object of the amendment." *Id.* at 2766. Section Five, Howard noted, provided "a direct affirmative delegation of power to Congress to carry out all the principles of all

these guarantees." *Id.* at 2766. *See also United States v. Morrison*, 120 S.Ct. 1740, 1755 (2000)("Section 5 is a 'positive grant of legislative power' that includes authority to 'prohibit conduct which is not itself unconstitutional and [to] intrud[e] into "legislative spheres of autonomy previously reserved to the states."'")(citations omitted); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989)(plurality opinion of O'Connor, J.)("Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to 'enforce' may at times also include the power to define situations which Congress determines threatens principles of equality and to adopt prophylactic rules to deal with these situations.").

2. *Section Five was Intended to Permit Congress to Act Where States Failed to Protect the Rights of Citizens*

The record before the Thirty-Ninth Congress was replete with instances not merely of official acts of discrimination against the freedmen, but of official failures to prevent or remedy "private" acts of oppression, perpetrated under the watch of indifferent state officials, or with their acquiescence or active support. *See, e.g.*, S. Exec. Doc. No. 39-2 (1866) (Message of the President of the United States Communicating, in Compliance with a Resolution of the Senate of the 12th Instant, Information in Relation to the States of the Union Lately in Rebellion, Accompanied by a Report of Carl Schurz on the States of South Carolina, Georgia, Alabama, Mississippi, and Louisiana; also a Report of Lieutenant General Grant,

on the Same Subject (Report on the Condition of the South)); H.R. Rep. No. 39-30 (1866) (Report of the Joint Committee on Reconstruction) (testimony on oppression and official failures to respond); H.R. Exec. Doc. No. 39-70 (1866).

Section One thus commands that no state shall "deny the equal protection of the law," and "when the equal protection is withheld, when it is not afforded, it is denied." Cong. Globe, 42d Cong., 1st Sess. 505 (1871) (statement of Sen. Pratt). As a necessary consequence, the clause gave rise to an affirmative duty on the part of the states: they are obliged not merely to refrain from unequal treatment, but they are obliged to provide "equal protection." "A state denies equal protection where it fails to give it. Denying includes inaction as well as action. A State denies protection as effectively by not executing as by not making laws." *Id.* at 501 (statement of Sen. Frelinghuysen). *Accord id.* at App. 182 (statement of Rep. Mercur) (deny means "to refuse, or to persistently neglect or omit to give" equal protection). To deny equal protection meant both the failure to enforce the laws and the failure to ensure that the benefits provided by law were provided equally; *id.* at App. 314 (statement of Rep. Burchard) ("the protection must be extended equally to all citizens. This duty must be performed through the legislative, executive, and judicial departments of its government. If the law-making power neglects to provide the necessary statute, or the judicial authorities wrongfully enforce the law so as to neutralize its beneficial provisions, or the executive allows it to be defied and disregarded, has not the State denied the enjoyment of that right?"); *id.* at 368 (statement of Rep. Sheldon) (clause embraces cases where state "refuses or neglects to

discharge" its duty); *id.* at 459 (statement of Rep. Coburn) ("Affirmative action or legislation is not the only method of a denial of protection by the State").

Thus, when the states regularly fail to protect discrete classes of citizens from acts of oppression or discrimination, they fail to provide the "equal protection of the laws." "If a State fails to secure to a certain class of people the equal protection of the laws, it is exactly equivalent to denying such protection. Whether that failure is willful or the result of inability can make no difference, and is a question into which it is not important that Congress should enter." *Id.* at App. 251 (statement of Sen. Morton); *accord id.* at 321 (statement of Rep. Stoughton); *id* at 375 (statement of Rep. Lowe) ("It is said that the States are not doing the objectionable acts. This argument is more specious than real. Constitutions and laws are made for practical operation and effect . . . What practical security would this provision give if it could do no more than to abrogate and nullify the overt acts and legislations of a State?"); Cong. Globe, 43d Cong., 1st Sess. 412 (1871) (statement of Rep. Lawrence) ("If a State permits inequality in rights to be created or meted out by citizens or corporations enjoying its protection it denies the equal protection of the laws. What the State permits by its sanction, having the power to prohibit, it does in effect itself").

Congress, as a corollary, was empowered to provide the protection that the states fail to afford. "The State, from lack of power or inclination, practically denied the equal protection of the law . . . And if [Congress] finds that a citizen's constitutional rights are in jeopardy from any cause, that they have been ruthlessly stricken down or wrongfully denied,

and existing laws are inadequate for his relief, it is bound to make such appropriate legislation as shall be sufficient for his protection and redress." Cong. Globe, 42d Cong., 1st Sess. 428 (1871) (statement of Rep. Beatty); *id.* at 71 (statement of Rep. Shellabarger) ("Two things are provided--equal laws and protection for all; and whenever a State denies that protection Congress may by law enforce protection"); *id.* at 370 (statement of Rep. Monroe) ("we shall have no difficulty in finding sufficient grants of power in the Constitution to enable us to protect the lives and property of our fellow citizens when the State governments fail to protect them. We should go to the Constitution expecting to find weapons to defend the weak and the poor, not weapons to strike them down"). And at times, the only sufficient protection--the only "appropriate legislation"--would be in part prophylactic: legislation designed to prevent the abuses permitted or perpetuated by the states. "The true construction of the [equal protection] provision is: `No State shall fail or refuse to provide for the equal protection of the laws.' . . .Is it meant that Congress may enforce a denial? No; it means that Congress may prevent a denial." *Id.* at 482 (statement of Rep. Shellabarger). Only thus could Congress realize the promise of equality envisioned when the Amendment was adopted.

II. *Congress' Power Under Section 5 to Enforce the Fourteenth Amendment is not Limited to Protection of Suspect or Quasi-Suspect Classes*

It is clear from the historical record that Congress intended the guarantees of the Fourteenth Amendment to secure equal rights to all citizens. Although the Court extends particular solicitude to

certain groups of persons by examining legislative classifications relating to them with heightened scrutiny, variations in the level of review are not equivalent to variations in the right at issue. The level of scrutiny afforded by a court neither defines the substance of the right under the Fourteenth Amendment nor diminishes it; "no one has or would argue that the value of liberty varies somehow depending on whether one is alleged to be ill or retarded," *Heller v. Doe,* 509 U.S. 312, 341 (1993)(Souter, J. dissenting).

As recent decisions of the Court reflect, the fact that a legislative classification is subject to rational basis review does not mean that the citizens so classified lose equal protection rights under the Fourteenth Amendment. *City of Cleburne*, 473 U.S. at 432; *Vill. of Willowbrook v. Olech*, 120 S.Ct. 1073, 1074-75 (2000). By its very text, the equal protection clause belongs to all persons.

Rather, if Congress acts to prohibit recognized constitutional violations by the States, or if it acts to prevent those violations through prophylactic legislation and assembles a record of a pattern of violation of constitutional rights to justify such prophylactic action, both historical understanding and the Court's current framework permit Congress to enforce the guarantees of the Fourteenth Amendment, so long as the legislation is congruent and proportional to the identified injuries. Although it has occasionally been suggested that Section 5 power is limited to protected classes, *EEOC v. Wyoming*, 460 U.S. 226, 262 (1983)(Burger, C.J.), the idea that Congress can only legislate under Section 5 to protect certain classes of citizens has never commanded a majority of this

Court or of any Court of Appeals, even those which have held the ADA invalid. *See, e.g., City of Maumelle v. Alsbrook*, 184 F.3d 999, 1008 (8th Cir. 1999)(*en banc*)("We agree that Congressional enforcement of equal protection rights under Section 5 is not limited to suspect classifications"); *Brown v. North Carolina Div. of Motor Vehicles*, 166 F.3d 698, 706 (4th Cir. 1999), *pet. for cert. filed*, 68 U.S.L.W. 3164 (U.S. Sept. 8, 1999) (No. 99-424) (""It is true, of course, that even rational basis review places limits on the States that Congress may seek to enforce").

III. *The Americans with Disabilities Act is Appropriate Legislation to Enforce Section 1 of the Fourteenth Amendment*

Although Congress' power to legislate under Section 5 is not limited to any particular class or category of persons, it *is* limited to remedying and preventing violations of the Fourteenth Amendment rather than substantive redesign of its meaning. *City of Boerne*, 521 U.S. at 519. The Court's recent decisions in the Eleventh Amendment area, however, have not purported to limit Congress's role in gathering facts and reaching conclusions as to violations of those rights. Moreover, the Court has also reaffirmed its deference to Congressional conclusions that legislation is necessary to remedy or prevent those violations. This Court has in fact gone out of its way to repeatedly underscore that "[i]t is for Congress in the first instance to determine 'whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,'" *Kimel*, 120 S.Ct. at 644 (quoting *City of Boerne*, 521 U.S. at 536 (quoting *Katzenbach v. Morgan*, 348 U.S. 641, 651 (1966))).

To be sure, the Court has also insisted that Congress respect the principles of federalism in this process. Thus, even when acting pursuant to Section Five, Congress must clearly state its intent to override the Eleventh Amendment immunity of the states, *Atascadero State Hospital v. Scanlon*, 473 U.S. 274 (1985), and must target State action, *United States v. Morrison*, 120 S.Ct. 1740, 1758 (2000). When Congress enacts legislation to enforce the Fourteenth Amendment, it must be congruent and proportional to the underlying constitutional problem. At the very least, this Court's own cases hold that this burden can be met in two ways, both of which apply in the case of the Americans with Disabilities Act. First, ostensibly neutral rules sometimes disguise discrimination, and Congressional action against those rules may be justified by a showing that the constitutional violation is likely to go undetected without a prophylactic rule, as in the Voting Rights Act. Second, Congress may have "identified . . . [a] pattern of constitutional violations," *Kimel*, 120 S.Ct. at 645, that more targeted legislation has been unable to remedy. Although Congress responded to both of these problems in enacting the ADA, this brief will focus on the second, demonstrating that Congress passed the ADA after decades of more targeted federal legislation failed to remedy State violations of the constitutional rights of people with disabilities.

A. *Congress Passed the ADA After Twenty Years of Targeted, Discrete Legislation Failed to End State Discrimination Against People with Disabilities*

Congress passed more than twenty years of legislation against disability discrimination in a number of discrete areas, including architectural

barriers to government buildings and courthouses, education, transportation, voting, and housing. Beginning in 1968, with the Architectural Barriers Act of 1968, 42 U.S.C. § 4151; the Urban Mass Transportation Act of 1970, 49 U.S.C. § 1612; the Education for Handicapped Children Act, 20 U.S.C. § 1401 (current version titled the Individuals with Disabilities in Education Act); and continuing through statutes such as the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6000, the Voting Accessibility for the Elderly and Handicapped Act of 1984, 42 U.S.C.A. § 1973ee-1, and the Fair Housing Amendments Act, 42 U.S.C. § 3602 *et seq*, Congress combined carrots and sticks in a variety of ingenious ways to try to end State discrimination against disabled citizens in specific areas of the law. It offered States federal funds to cease discrimination in education, gave the Department of Justice standing to sue States to prevent discrimination in institutions, mandated that state buildings and transportation systems which received federal funds must be accessible to people with disabilities, and insisted that polling places in federal elections be accessible (thus effectively requiring polling places to be accessible for all elections).

One year after passing Section 504 of the Rehabilitation Act, the first major federal prohibition of discrimination against people with disabilities, Congress amended the act to make the prohibitions stronger, motivated in part by findings of widespread discrimination by the States:

> [i]ndividuals with handicaps are all too often excluded from schools and educational programs, barred from

> employment or are underemployed because of archaic attitudes and laws, denied access to transportation, buildings and housing because of architectural barriers and lack of planning, and are discriminated against by public laws which frequently exclude citizens with handicaps or fail to establish appropriate enforcement mechanisms.

S. Rep. No. 93-1297 (1974), at 28, *reprinted in* 1974 U.S.C.C.A.N. 6373, 6400.

The Education for All Handicapped Children Act was passed as a result of the unconstitutional exclusion by States of eight million children from school. *Smith v. Robinson,* 468 U.S. 992, 1009 (1984). The Developmental Disabilities Assistance and Bill of Rights Act contained a bill of rights section for developmentally disabled citizens aimed at the States because "[t]he Committee is well aware that our disabled and handicapped citizens are often unreasonably and unnecessarily deprived of their rights and relegated to second class status." H.R. Rep. No. 94-58, at 13 (1975), *reprinted in* 1975 U.S.C.C.A.N. 919, 925.[4]

In the years prior to the ADA hearings, Congress heard voluminous reports of State violations

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[4] Although this Court held that the Bill of Rights was unenforceable in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 19 (1981), what matters here is that Congress found out that States unreasonably deprived disabled citizens of their rights and relegated them to second-class status, a factual finding that Congress attempted to remediate through the provisions of the statute, including the Bill of Rights.

of the constitutional rights of their institutionalized citizens. For example, the House Conference Report on the Civil Rights of Institutionalized Persons Act noted:

> Since 1971, the Attorney General has participated in a series of civil actions seeking to redress widespread violations of constitutional and federal statutory rights of persons residing in state institutions. [Because two federal courts had held that the Attorney General did not have standing to participate in such litigation, Congress enacted this legislation to explicitly confer such standing]... H.R. 10 ensures that institutionalized people will be afforded the full measure of protections guaranteed to them by the Constitution of the United States.

H.R. Conf. Rep. No. 96-897 (1980), *reprinted in* 1980 U.S.C.C.A.N. 832. Congress passed the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997, specifically to permit the Attorney General to sue States for violating the constitutional and federal rights of persons in institutions, many of whom were severely disabled.

Despite the hopes expressed in the House Report, violations of the constitutional rights of institutionalized citizens continued unabated on a national scale. In April 1985, Senate staff presented a report to the Senate Committee on Labor and Human Resources summarizing the results of their visits to thirty-one state institutions in twelve states. After

conducting approximately 600 interviews, the Report documented deaths and beatings, sometimes of patients in seclusion or restraints, across the nation from South Carolina to California. The Report summarized that "residents are vulnerable to abuse and serious physical injury...sexual advances and rape," and concluded that neither the States nor the Federal government were successful in controlling these conditions. S. Rep. No. 99-50, pt. 2, App. at 2, 20-25, 76-82 (1985) (Staff Report on the Institutionalized Mentally Disabled). Many of the conditions reported to Congress clearly implicated the constitutional right to safety and freedom from harm in institutional settings. *Youngberg v. Romeo*, 457 U.S. 307 (1982). After extensive hearings and receiving this report, Congress passed the Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 U.S.C. 10801, yet another Congressional response to State violations of the constitutional rights of persons with disabilities. While the Civil Rights of Institutionalized Persons Act gave the Justice Department standing to sue to protect institutionalized persons' rights, the Protection and Advocacy for Mentally Ill Individuals Act gave the States money to create programs to prevent and remedy the violations of institutionalized disabled persons' rights—but only while they were in the institutions and for ninety days following discharge, 42 U.S.C. §§ 10805(a)(1)(B) & (C).

Despite the passage of these more narrow statutes, testimony before Congress in support of the ADA revealed that little had changed. The prior laws had not resolved the unconstitutional injuries. This truth was reflected in the national reports before Congress and in the testimony of both disabled

witnesses and federal and state officials. Then-Attorney General Thornburgh noted that:

> [o]ver the last twenty years, civil rights laws protecting disabled persons have been enacted in a piecemeal fashion. Thus, existing Federal laws are like a patchwork quilt in need of repair. There are holes in the fabric, serious gaps in coverage that leave persons with disabilities without adequate civil rights protections.

H.R. Rep. No. 101-485, pt. II, at 48 (1990), *reprinted in* 1990 U.S.C.C.A.N. 330.

The Attorney General of Illinois, Neil Hartigan, Dr. Mary Lynn Fletcher, and numerous other witnesses confirmed that neither federal legislation nor state legislation aimed at protecting people with disabilities was accomplishing that goal. Mr. Hartigan testified that imposing a non-discrimination mandate only upon recipients of federal funds under the Rehabilitation Act resulted in "total confusion" and "inability to expect consistent treatment." *See* S. Rep. No. 101-116, at 12 (1989). Fletcher testified that because Federal assistance often didn't reach rural areas, there was no protection from discrimination for people with disabilities who lived there. *Id.* at 12-13. Harold Russell, Chairman of the President's Committee on Employment of People with Disabilities, reported that "the fifty State Governors' Committees, with whom the President's Committee works, report that existing State laws do not adequately counter such acts of discrimination." *Id.* at 18.

After hearing this testimony, Congress explicitly concluded in the language of the ADA itself: "current federal and state laws are inadequate to address the discrimination faced by people with disabilities . . . " 42 U.S.C. § 12101(a)(3). When "previous legislation has proved ineffective," broader prophylactic legislation is justified, *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966). In assessing the congruence and proportionality of the ADA, it is appropriate for this Court to consider the years of evidence of State discrimination before Congress as it enacted discrete statute after discrete statute, which federal, state and individual witnesses testified had failed to end discrimination against people with disabilities. In this context, "[w]hen Congress enacts appropriate legislation to enforce [the Fourteenth Amendment], federal interests are paramount, and Congress may assert an authority over the States which would be otherwise unauthorized by the Constitution." *Alden v. Maine*, 527 U.S. 706, 756 (1999)(citations omitted).

In passing the Americans with Disabilities Act, Congress was not acting on a blank legislative slate, nor did it seek to overturn existing Equal Protection jurisprudence, as in *City of Boerne*; it met its responsibility to present a fully developed evidentiary record of discrimination, unlike *Kimel*, and clearly targeted State actors, unlike *Morrison*.

It would not, of course, be constitutionally sufficient had Congress acted to protect people with disabilities from adverse State action that was rationally related to legitimate state objectives. State deprivations of the rights of disabled people must rise to the level of constitutional violations to support

corrective action such as Title II of the ADA. Amici contend that even under rational basis review, the earlier statutes and then the ADA targeted widespread State violations of fundamental rights such as the right to vote and the right to safety in institutional settings, as well as arbitrary and irrational exclusion from school, employment and transportation. These continuing actions and policies by the States constituted violations of disabled people's right to equal protection of the laws. The result in *City of Cleburne* itself demonstrates that government entities do violate the constitutional rights of disabled individuals under the rational basis standard.

B. *Rational Basis Review is Not a Reflection of the Severity or Pervasiveness of Constitutional Injuries, but Rather of the Appropriate Branch of Government to Redress Such Injuries*

The Court's holding in *City of Cleburne* establishes rational basis review as the standard for determining whether States have violated the constitutional rights of their disabled citizens, although the Court also explicitly stated that it was making the rational basis finding "absent controlling Congressional direction." 473 U.S. at 440. The reasons cited by the Court for selecting rational basis review in *City of Cleburne* argue strongly for upholding Congressional action in passing the ADA, a law which concededly prohibits some behavior that the Constitution alone would not condemn. The Court cited two reasons for choosing rational basis review. First, because disability is not simply a matter of physical or mental impairment but of the degree to which that impairment interferes with, or is regarded as interfering with, one's functional abilities, it raises

complex questions of definition. *See, e.g. Albertson's v. Kirkingburg*, 527 U.S. 555, n. 12 (1999)(some people with monocular vision are disabled and others are not). The Court's observation in *City of Cleburne* with regard to mentally retarded people is even more true of people with disabilities in general: they are "a large and diversified group" more difficult to define than categories such as alienage and illegitimacy. 473 U.S. at 442. Second, unlike race or gender, which were recognized as rarely presenting relevant considerations in any principled decision making, disability is sometimes relevant to decisionmaking. Disability has significant consequences in the world that a rational legislature can take into account. Notably, disability has been the basis on which legislatures have passed beneficial legislation. The rational basis standard of review gives both States and the federal government the flexibility to take the complex nature of disabilities into account where they are relevant, and to act to benefit groups of people with disabilities. If this Court had chosen a higher level of scrutiny against which to evaluate differential treatment of people with disabilities, programs such as disability benefits for severely disabled people might have fallen under challenge by non-disabled people. *See Adarand v. Pena*, 515 U.S. 200 (1995)(subjecting affirmative action programs to strict scrutiny review).

However, as the Court's decision in *City of Cleburne* shows, the rational basis standard of review does not give States a free pass to engage in widespread invidious and arbitrary discrimination. The fact that some classifications based on disability are rational does not mean that people with disabilities are not also subject to irrational, widespread and persistent discrimination in violation

of the Fourteenth Amendment. The Court's selection of rational basis review in *City of Cleburne* could not be (and did not purport to be) a factual finding about the pervasiveness and persistence of unconstitutional discrimination by the States in general against people with mental retardation, much less people with disabilities. After hearing written and oral testimony from hundreds of witnesses, and studying hundreds of pages of research and reports submitted to it, Congress did make such findings. It found that much state legislation, policy and practices toward people with disabilities was neither remedial nor even rational, but exclusionary, arbitrary, segregationist, irrational, based on myths and stereotypes, and springing from ignorance and even hostility. Unlike the record before Congress in *Kimel*, the massive record compiled by Congress in passing the ADA implicated a broad range of State statutes, policies, and customs that violated even the rational basis standard of review.

When Congress passed the ADA, it was aware that State statutes providing protection to people with disabilities existed on paper but were not meaningfully enforced. Even in *City of Cleburne*, the Court's reference to a Texas statute giving Texas citizens the right to live in group homes as protective was undermined by the recognition that plaintiffs in *City of Cleburne* dropped their claim under that statute--which had been in force for almost ten years at the time of the litigation--because "[t]he Act had never been construed by the Texas courts," *City of Cleburne* at 444 n.11.

In fact, what Congress learned in the ADA hearings was that the very presence of these well-

intentioned but unenforced statutes served to shield the State's more invidious actions:

> The discriminatory nature of policies and practices that exclude and segregate disabled people has been obscured by the unchallenged equation of disability with incapacity and by the gloss of 'good intentions.' ...The social consequences that have attached to being disabled often bear no relationship to the physical or mental limitations imposed by the disability. For example, being paralyzed has meant far more than being unable to walk-it has meant being excluded from public schools, being denied employment opportunities, and being deemed an 'unfit parent.' These injustices coexist with an atmosphere of charity and concern for disabled people.

H.R. Rep. 101-485, pt. II, at 41 (1990) (testimony of Arlene Mayerson).

At the time Congress was considering the ADA, the record of states towards people with disabilities bristled with contradictions - pity and antipathy, overprotection and outright brutality - resulting in a complicated mixture of legislation, policy and practice that occasionally protected the disabled, sometimes used protection as an excuse for invidious discrimination (as in *City of Cleburne*), and sometimes simply discriminated in a harsh and unambiguous manner. What Ms. Mayerson's testimony underscores--and what supports both rational basis review by the courts *and* deference to congressional judgment in crafting the Americans with Disabilities Act--is that

while there is a record of a core of hostility, irrationality, and failure to protect people with disabilities by the States, much of the discrimination is more subtle but just as damaging, and intentional discrimination is more difficult to see in the individual case than in the composite portrait presented by the voluminous testimony heard by Congress when it considered the ADA.

The meaning of discrimination itself as a legal concept is more difficult in the case of people with disabilities. Although Congress recognized that certain patterns of discrimination against people with disabilities strongly resembled patterns of discrimination on the basis of race, including the emphasis on state-imposed segregation, widespread exclusion from the public school system and from voting, it was equally clear that traditional concepts of discrimination developed in the context of race discrimination were not completely suited as a mode of analysis for people with disabilities.

For example, it is crucial to understand that applying traditional concepts of equal protection to people with disabilities would simply maintain a discriminatory status quo. Society can rationally aspire to be "color-blind" in a way that it cannot and should not wish to be "disability-blind." Giving a person who is mobility-impaired an equal right to vote or be a juror, without concomitant changes in polling places or courtrooms, may accomplish nothing practical, and the framers of the Fourteenth Amendment wanted nothing if not to make equal protection real. They were not content with the equality on paper that existed in some states, when contrasted with the actual conditions reported by

General Schurz and the Committee of Fifteen. Neither equality nor intentional discrimination mean the same thing in the context of disability discrimination. If police put a paraplegic arrestee in a paddy wagon in exactly the same way as they would put an able-bodied arrestee into the wagon, they are not providing equal protection, *see Gorman v. Bartch,* 152 F.3d 907 (8th Cir. 1998). If a ramp into a courthouse or an interpreter at a town meeting is considered "something extra," beyond the bounds of equal protection, then equal protection will be meaningless for people who cannot climb the steps or hear the speakers. "Reasonable accommodation" that requires a ramp to the polling booth or an elevator to the courtroom is not something "extra"--it is the only way to ensure equal protection of the laws for people with mobility impairments. If state-operated transportation systems are not equipped with lifts, they are more segregated on the basis of disability than the buses of Montgomery were on the basis of race.

Thus, both the nature of disability and the nature of discrimination based on disability is complex, and it is in these circumstances that the legislative process is particularly well suited to remediation. The Court's rationale for its decision in *City of Cleburne* applies equally well to upholding the Americans with Disabilities Act:

> [h]ow this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary. Heightened scrutiny inevitably involves substantive judgments about legislative

> decisions, and we doubt that the predicate for such judicial oversight is present where the classification deals with mental retardation.

473 U.S. at 442-43.

Just as the complexity of disability and of the ways that discrimination on the basis of disability manifests itself were reasons for the Court not to step out in front of the legislative process in *City of Cleburne*, they are reasons for the Court not to overturn the laborious fact-gathering, negotiations and compromises Congress went through in passing the ADA. They also serve as reasons for this Court to defer to Congress's conclusion that prohibition of a concededly broader swath of constitutional behavior was required to guarantee equal protection of the laws for persons with disabilities. In the case of people with disabilities, if legislation "merely parrots the precise wording of the Fourteenth Amendment," *Kimel*, 120 S.Ct. at 644, it would be virtually useless to enforce equal protection. The ADA itself concededly prohibits States from engaging in constitutional behavior as a means of deterring unconstitutional behavior. However, as the Court recently reaffirmed in *Kimel*, "that [a statute] prohibits very little conduct likely to be held unconstitutional, while significant, does not alone provide the answer to our § 5 inquiry. Difficult and intractable problems often require powerful remedies, and we have never held that § 5 precludes Congress from enacting reasonably prophylactic legislation." *Id.* at 648.

Disability discrimination is the classic example of an extremely difficult and intractable problem. The ADA represents an example of what Congress is best

suited to do in dealing with such problems, and is the product of negotiations, amendments, line-drawing, and compromise before passage by Congress. Its numerous provisions, including safe harbor exclusions for insurance companies, elimination of damage actions under Title III, and a number of qualifications and defenses, reflect a struggle by hundreds of legislators to reconcile the twin realities of discrimination and difference. That struggle, which took several years and was the culmination of twenty years of more limited federal efforts to entice, exhort and coerce the States to cease discriminating against their disabled citizens, is entitled to respect by this Court.

IV. *Lower Courts are Increasingly Confused and in Conflict as to the Scope of Congressional Power to Protect the Civil Rights of Individuals Against Violations by the States*

"Liberty finds no refuge in a jurisprudence of doubt." *Planned Parenthood v. Casey*, 505 U.S. 833, 843 (1992). The federal statutory framework protecting the civil rights of people in this country against violations by the States is undermined by doubt and uncertainty. Despite this Court's repeated recognition of Congress' power to enforce Section 5 of the Fourteenth Amendment, its recent cases have created substantial uncertainty in the lower courts and among litigants as to the scope of Congressional power to protect the civil rights of citizens against encroachments by the States. The decision in *City of Boerne* has led States to challenge their obligations under virtually the entire structure of federal civil rights protection. *In re Employment Discrimination Litigation*, 198 F.3d 1305 (11th Cir. 1999)(challenging

Title VII); *Holman v. Indiana*, 211 F.3d 399 (7th Cir. 1999)(challenging Title VII); *Fitzwater v. First Judicial District of Pennsylvania*, No. Civ.A. 99-3274, 2000 U.S. Dist.LEXIS 4931 (E.D. Pa. April 11, 2000)(challenging Title VII); *Sandoval v. Hogan*, 197 F.3d 484 (11th Cir. 1999)(challenging Title VI); *Lesage v. Texas*, 158 F.3d 213 (5th Cir. 1998)(challenging Title VI); *Litman v. George Mason University*, 186 F.3d 544 (4th Cir. 1999)(challenging Title IX), *cert. denied* 120 S.Ct. 1220 (2000). One court even reassessed whether the Voting Rights Act was a constitutional abrogation, *Mixon v. Ohio and Michael White*, 193 F.3d 389, 398-99 (6th Cir. 1999). A significant array of other federal statutes have also been challenged as violative of States' Eleventh Amendment rights. *Union Pacific v. State of Utah*, 198 F.3d 1201 (1999)(challenging Railroad Revitalization and Regulatory Reform Act); *Burnette v. Carothers*, 192 F.3d 52 (2d Cir. 1999)(challenging CERCLA); *Bell South Telcoms v. MCIMetro Access Transmission Services*, 97 F.Supp.2d 1363 (N.D. Ga. 2000)(challenging Telecommunications Act of 1996). The circuit courts are in disarray and conflict about the constitutionality of most federal antidiscrimination statutes.

This case, markedly different from the cases in which the Court has invalidated Congressional legislation to date, is an opportunity to reaffirm that this Court is not intent on radically rearranging the separation of powers or undermining the federal government's power to protect against State violations of civil rights. Unlike *City of Boerne* and *Kimel*, Congress assembled a voluminous record of hundreds of individual testimonies, as well as reports and statistics based on national studies. It acted after two decades of more narrowly tailored legislation failed to

end discrimination against people with disabilities. Congress took its role seriously in enacting the ADA. The Court can use this opportunity to reaffirm its own expressed commitment that when Congress responsibly carries out the mandate of Section 5 to correct identified State violations of constitutional rights, the Court will give Congress "wide latitude in determining where [the line between appropriate remedial legislation and redefinition of constitutional rights] lies." *City of Boerne,* 521 U.S. at 520. In the process, the Court can give direction and clarity to lower courts and litigants.

V. *Conclusion*

Where Congress carefully assembles a record replete with factual support for its conclusion that people with disabilities are being subjected to unconstitutional discrimination by the States, and engages in over two years of negotiations, amendments, and redrafting to accommodate the parties' differing interests, it has acted precisely as a legislature in a democratic nation should act in addressing a difficult and complex social problem. "Our national experience teaches us that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches." *City of Boerne*, 521 U.S. at 535-36. In this case Congress has acted within its proper role in abrogating the States' Eleventh Amendment rights. This Court should defer to its well-documented findings as to the extent and urgency of discrimination against people with disabilities, and the need for sweeping remedial legislation to correct it. *Amici* urge the Court to affirm the Court of Appeals' decision.

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In The
Supreme Court of the United States

UNIVERSITY OF ALABAMA AT BIRMINGHAM BOARD OF TRUSTEES, et al.,

Petitioners,

v.

PATRICIA GARRETT, et al.,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit

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INTEREST OF THE *AMICI CURIAE*

Amici curiae are over 100 historians and scholars who want to ensure that the well-documented evidence of widespread state discrimination against persons with disabilities is not forgotten by this Court.*

ARGUMENT

Persons with a broad range of disabilities – cognitive, motor, sensory and psychiatric – have been victims of intentional and irrational state-sponsored discrimination and exclusion from the basic rights and citizenship in every aspect of public and private life, including employment, housing, the judicial system, marriage, parenting, and education. Congress was aware of the centuries of discrimination by state and local governments against persons with disabilities when it enacted the ADA. This brief summarizes the states' history of official discrimination. The appendix contains hundreds of examples of state constitutions and laws that discriminate against these citizens.

I. STATE EMPLOYERS HAVE DISCRIMINATED AGAINST PERSONS WITH DISABILITIES

A. When The ADA Was Enacted, State Employment Discrimination Against Persons With Disabilities Was Pervasive

For decades, state employers have engaged in intentional widespread discrimination against people with disabilities. Congress documented this rampant discrimination when it adopted the ADA. According to a 1989 report of the Advisory Commission on Intergovernmental Relations – issued during the deliberations

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* Petitioners, Respondents and the United States have consented to the filing of this brief.

on the ADA – 82 percent of state officials believed that negative attitudes towards persons with disabilities played a part in their employment decisions.[1] Congress knew that discrimination against persons with disabilities was "more prevalent in the public sector."[2] Although Alabama claims (at p. 7) that it "has a long history or providing support, rehabilitation and protection for individuals with disabilities," a comprehensive 1980s study found that (except for persons with speech impairments), the percentage of persons with disabilities working for the government was actually *lower* than in the private sector.[3] This state-sponsored employment discrimination is not only irrational, but has pervasively reinforced broader employment discrimination against persons with disabilities. If the states were "teaching by their example" (Pet. Br. 4), then the lesson was that official job discrimination was pervasive.

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1 *Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal* (Apr. 1989). *See also* Sharon L. Harlan & Pamela M. Robert, *Disability in Work Organizations: Barriers to Employment Opportunity*, Final Report, (Univ. of Albany & State U.N.Y. Nov. 1995) (reporting on 1990 data) (state employees "confront disabilities with stereotypes, ignorance, misinformation, fear, and pity that impede progress toward equal opportunity"); Barbara Hoffman, *Employment Discrimination Based on Cancer History: The Need for Federal Legislation*, 59 TEMPLE L.Q. 1, 2-9 (1986) (describing reasons and types of public employment discrimination against persons with cancer).

2 *Employment Discrimination Against Cancer Victims and the Handicapped: Hearings on H.R. 370 and H.R. 1294 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 99th Cong. 57 (June 6, 1985) (statement of Ivan Barofsky, Institute of Social Oncology).

3 Dong W. Cho, Cerebral Palsy Research Found. of Kansas, Inc., *Problem Solving with Rehabilitation Engineering: Labor Market Activities of Disabled Persons: Analysis of a National Survey of Disabled Persons*, iii (Spring 1982).

B. The Congressional Record Is Filled With Evidence Of State Employment Discrimination

The legislative history of the ADA shows that Congress was aware of widespread intentional and irrational employment discrimination by the states. For example, Congress was aware that most government agencies in California routinely refused to hire cancer survivors.[4] The Congressional testimony of individual witnesses in hearings on the ADA also reflected employment discrimination by states. For example:

- Susan Downie testified that she was denied a job at a large state mental retardation facility because of her mobility impairment.[5]

- Denise Karuth testified that the New York State Commission for the Blind would not sponsor her for a masters degree in rehabilitation counseling because "the State would not hire blind rehabilitation counselors."[6]

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4 *Americans with Disabilities Act of 1989: Hearing on H.R. 2273 Before the Subcomm. on Employment Opportunities and the Subcomm. on Select Education of the House Comm. on Education and Labor*, 101st Cong. 19-20 (Sept. 13, 1989) (statement of Evan J. Kemp, Jr., Commissioner EEOC).

5 *Americans with Disabilities Act of 1988: Oversight Hearing on H.R. 4498 Before the Subcomm. on Select Education of the House Comm. on Education and Labor*, 100th Cong. 144-45 (Oct. 24, 1988) (statement of Susan Downie, Director, Traumatic Brain Injury Services, Rehabilitation Center, Hartford).

6 *Id.* at 195 (statement of Denise Karuth, Mass. Coalition of Citizens with Disabilities).

- A professor of veterinary medicine at a state university was fired because he had AIDS.[7]

Congress also found that state vocational rehabilitation agencies excluded adults with long-term disability. Congress knew, for example, that Rhode Island's state vocational rehabilitation agency refused to provide a quadraplegic with further education because "they did not see any reason" for him to get off the SSI public benefits rolls.[8] A witness from Maine recounted how a vocational client with a Ph.D. in chemistry "was sent to Goodwill to sort socks as a part of his training and testing."[9]

Congress had been aware of state-sponsored employment discrimination against persons with disabilities for years. For example, in 1977, Congress was informed of the growth of violations of Section 504 of the Rehabilitation Act by colleges and universities, school districts, and government agencies.[10] In 1978, Congress learned that persons with disabilities were under-represented in the CETA program, in which federal funds were given, principally to

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7 *Americans with Disabilities Act of 1989: Hearing on S. 933 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources*, 101st Cong. 404 (May 9, 1989) (statement of National Organizations Responding to AIDS).

8 *Hearings*, *supra* note 5, at 41 (statement of Donald Levine, President PARI Independent Living Program).

9 *Id.* at 173 (statement of Lelia Batten, Portland Coalition for Psychiatrically Labeled).

10 *Implementation of Section 504, Rehabilitation Act of 1973: Hearings Before the Subcomm. on Select Education of the House Comm. on Education and Labor*, 95th Cong., 290-368 (Sept. 16, 1977) (statement of David Tatel, Director, Office for Civil Rights, Dep't of Health, Education and Welfare).

states and counties, for job training and employment.[11] In 1987, Congress found that "public and private employers tend to be unaware of the capability of persons with developmental disabilities to be engaged in competitive work in integrated settings."[12] Also in 1987, Congress knew that *none* of the twenty-three state or local jurisdictions surveyed was willing to hire blind applicants; many excluded applicants with a history of cancer; and amputees faced widespread official discrimination.[13]

Alabama claims (at pp. 38-39) that in the ADA's legislation history, the "only real evidence . . . was of states over protecting the constitutional rights of the disabled, not undermining them." To the contrary, Congress knew that the Governor's Committees of all fifty states, responsible for increasing the employment of persons with disabilities

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11 *Rehabilitation Act of 1973: Oversight Hearings Before the Subcomm. on Select Education of the House Comm. on Education and Labor,* 95th Cong. 336, 368 (Apr. 7, 1978) ("During the 15 months ending September 30, 1976, handicapped men and women made up only 4% - 81,000 - of all persons enrolled in title I programs and less than 3% of those in public service jobs under titles II and IV.") (statement of T.P. Hipkens, Director, Ass'n of Rehabilitation Facilities).

12 133 Cong. Rec. H6996 (daily ed. Aug. 4, 1987). There were also numerous news articles about state employment discrimination against persons with disabilities. *See, e.g., Report Finds Legal Discrimination Against Women State Job Holders,*" UPI, Cal., Jan. 8, 1989 (1988 Personnel Board report showed significant underrepresentation of workers with disabilities in state jobs); *Latinos Still Lag in State Hiring, Lawmakers Told,* L.A. TIMES, Apr. 15, 1988 (1987 Personnel Board report showed workers with disabilities second-most underrepresented group in state jobs); *When Illness Leaves Social Side Effects,* U.S. NEWS & WORLD REPORT (Aug. 13, 1984) (noting conflicting state court decisions regarding disability discrimination).

13 *Civil Rights Restoration Act of 1987: Hearings on S. 557 Before the Senate Comm. on Labor and Human Resources,* 100th Cong. (Mar. 19, 1987).

generally, had reported that state laws were inadequate to counter discrimination faced by persons with disabilities.[14] At least half of the state laws that did exist provided no protection against discrimination based on perceived disabilities.[15]

C. Case Law Establishing State-Sponsored Employment Discrimination

Congress was also aware of the numerous cases establishing intentional and irrational state-sponsored disability discrimination in employment.[16] In *School Board v. Arline*, 480 U.S. 273 (1987), the Court held actionable state employment discrimination based upon irrational fears of a disability. On remand, the trial court held that a school district's termination of a teacher with tuberculosis was unreasonable. *Arlene v. School Board*, 692 F. Supp. 1286, 1292 (M.D. Fla. 1988). Similarly, in *Chalk v. United States District Court*, 832 F.2d 1158 (9th Cir. 1987), a teacher was demoted after being diagnosed with AIDS. In *Duran v. City of Tampa*, 451 F. Supp. 954, 955 (M.D. Fla. 1978), a police officer applicant with a childhood history of epilepsy was rejected because of an irrational policy excluding those with any history of epilepsy, despite medical evidence that the applicant was able to serve as police officer. In *Schmidt v. City of Chicago*, No. 86 C 8031, 1988 U.S. Dist. LEXIS 12893 (N.D. Ill. Nov. 9, 1988), a police officer who underwent double mastectomy and breast reconstruction due to cancer was told to resign because of her prosthetic breasts.

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14 S. Rep. No. 101-485(II), at 38 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 320.

15 Hoffman, *supra* note 1, at 20.

16 *See Conroy v. Aniskoff*, 507 U.S. 511, 516 & n.10 (1993) (Court presumes Congress is aware of the relevant case law).

D. Statistical Data Show State Employment Discrimination

Petitioner claims (at p. 4) that "[n]o pattern and practice of state equal-protection violations exist when it comes to alleged employment or public-access discrimination by state governments. Neither does any tenable threat of future unconstitutional discrimination exist. . . . Congress did not show, or even try to show, that the states have previously violated the constitutional rights of the disabled." To the contrary, at the time the ADA was enacted, Congress had access to statistical data showing that persons with disabilities were under-represented in government employment, and that discrimination was more prevalent in the public than private sector.[17]

In many states, the percentage of state employees with disabilities remains well below the percentage of working age Americans with disabilities, and in some states things are getting worse. For instance, California reports that the percentage of state employees with disabilities has steadily decreased in the last decade, from 8.27 percent in 1990 to 7.64 percent in 2000.[18] In several other states, the figures are also declining. Michigan's employment of disabled persons fell from 7.5 percent in 1990-91 to 5.7 percent in 1998-99.[19] Nebraska's figures were 4.3 percent in

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17 Cho, *supra* note 3, at iii.

18 Correspondence from Richard Watkins, MIS Dept., California State Personnel Bd., to Suzan Kern, Advocacy, Inc., Austin, Tex. (June 7, 2000) (A-278).

19 Letter from Mary L. Pollock, Employment Relations Bd. Appeals Officer (former State Equal Employment Opportunity Coordinator), Dep't of Civil Service, State of Mich., to Suzan Kern, Advocacy, Inc., Austin, Tex. (June 19, 2000) (A-279).

1990, but had fallen to 3.2 percent as of March 30, 2000.[20] Iowa's figures are also on the decline: from 5.8 percent in 1992 to 4.5 percent in 1998.[21]

II. STATES HAVE HISTORICALLY DENIED PERSONS WITH DISABILITIES THE RIGHT TO LIVE IN THE COMMUNITY

A. The Shameful History Of State-Sponsored Institutionalization

The right to make basic decisions about how to live, as well as the right to be free from bodily restraints, have long been recognized as core liberty interests protected by the due process clause. *See Youngberg v. Romeo*, 457 U.S. 307, 316 (1982). Nevertheless, the states have historically segregated and institutionalized persons with a wide range of disabilities, trammeling their fundamental liberties and warehousing them in deplorable public facilities.

1. The State-Mandated Regime of Segregation

The forced institutionalization of persons with disabilities reached its peak in the twentieth century. It continues today. "Fueled by the rising tide of Social Darwinism, the 'science' of eugenics, and the extreme xenophobia of those years, leading medical authorities and

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20 E-mail correspondence from Dorsey Seldon, Affirmative Action Specialist, Dep't of Administrative Services, Personnel Department, State of Neb., to Suzan Kern, Advocacy, Inc., Austin, Tex. (June 21 & 22, 2000) (A-285).

21 Correspondence from John H. TenPas, Disability Consultant, Division of Persons with Disabilities, Iowa Dep't of Human Rights, to Brian East, Advocacy, Inc., Austin, Tex. (June 22, 2000) (A-287).

others began to portray the 'feebleminded' as a 'menace to society and civilization . . . responsible in large degree for many if not all, of our social problems.'" *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 461-62 (1985) (Marshall, J., concurring in part and dissenting in part). In 1914, one authority declared, "One of the most shocking and easily cured evils is the increase of the feeble-minded, the begetters of numerous degenerate children." C.S. Yoakum, *Care of the Feebleminded and Insane in Texas*, BULL. U. TEX., No. 369 (Humanistic Ser. No. 16 Nov. 5, 1914). Official reports referred to people with disabilities as "defect[s] . . . [that] wounds our citizenry a thousand times more than any plague,"[22] as "by-products of unfinished humanity,"[23] and as a "blight on mankind"[24] whose mingling with society was "a most baneful evil."[25]

Spurred by the eugenics movement, every state in the country passed laws that singled out people with mental or physical disabilities for institutionalization. (Many of those laws are reproduced in the Appendix.) Often, these laws made it clear that the state's purpose was not to benefit disabled people but to segregate them from "normal" society. Thus, statutes noted that the disabled were segregated and institutionalized for being a "menace to society,"[26] so that

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22 Board of Trustees of the Utah State Training School, *Biennial Rep.* 3 (1938).

23 Baldwin, *The Causes, Prevention, and Care of Feeble-minded Children in Proceedings of the Texas Conference of Charities and Corrections*, Second Annual Meeting 87 (1912).

24 *Report of Vermont State School for Feeble-minded Children* 17-18 (1916).

25 *Oregon Bd. of Bldg. Comm'rs Report to the Twenty-fourth Legis. Assembly*, Regular Sess., 22-23 (1906).

26 1913 WIS. LAWS 963, ch. 689, § 1 (App. 272).

"society [may be] relieved from the heavy economic and moral losses arising from the existence at large of these unfortunate persons."[27]

The state-sponsored mission to remove persons with disabilities from society was so pervasive that many state governments even required their citizenry to assist them in locating and segregating these citizens. Physicians, teachers, and social workers, and even the general public were to report to the government all persons "believed by them to be feeble minded."[28] Some statutes authorized the removal of children with disabilities from their homes, even against the parents' wishes.[29] The state of Washington made it a crime for a parent to refuse state-ordered institutionalization. *See* 1905 WASH. LAWS 135, ch. 70, § 9 (App. 263). Once children were institutionalized, many state laws required parents to waive all custody rights.[30]

These state laws mandating institutionalization were "A regime of state-mandated segregation and degradation . . . that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow. Massive

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27 1915 TEX. GEN. LAWS ch. 90 § 1, 2 (App. 243). Similar statutes from other states are collected in the Appendix.

28 *See, e.g.,* 1921 S.D. SESS. LAWS 344, ch. 235 (teachers); 1917 OR. LAWS 740, § 5 (superintendents); 1918 KY. ACTS 171, § 30 (nurses); 1904 MASS. ACTS & RESOLVES, ch. 459, § 5 & 1906 MASS. ACTS & RESOLVES, ch. 508, §12 (any person).

29 *See, e.g.,* 1920 MISS. LAWS 294, ch. 210, § 17; 1921 W.VA. ACTS 480, ch. 131, § 4(a); 1909 OKLA. SESS. LAWS 538, ch. 34, art. 2 § 8.

30 *See, e.g.,* 1905 MICH. PUB. ACTS 169-70, No. 121; 1919 N.J. LAWS 508, ch. 217, §3. *See generally* David J. Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* 221 (Little, Brown & Co. 1971).

custodial institutions were built to warehouse the retarded for life; the aim was to halt reproduction and 'nearly extinguish their race.'" *Cleburne*, 473 U.S. at 462 (Marshall, J., concurring in part and dissenting in part) (citations omitted).

2. Ongoing State-Sponsored Discrimination

In *Olmstead v. L.C. ex rel. Zimring*, six justices recognized that singling out persons with disabilities for unnecessary institutionalization is a form of discrimination. 527 U.S. 581, 600 (1999), *id.* at 613-14 (Kennedy, J., concurring). This kind of state discrimination frequently violates the due process rights recognized in *Youngberg v. Romeo*, 457 U.S. 307 (1982).

Many state-run institutions continue to deprive disabled persons of liberty and dignity, while exposing residents to dangerous conditions. For example, in *Wyatt ex rel. Rawlins v. Rogers*, 985 F. Supp. 1356, 1362 (M.D. Ala. 1997), a federal judge described Alabama's state-run institutions as "essentially warehousing patients in an inhumane environment." Petitioner's state hospital lacked "a humane psychological and physical environment, qualified staff in numbers sufficient to administer adequate treatment, and individualized treatment plans." *Id.* at 1361. Even though Alabama entered into a consent decree to improve the state's record on institutionalization, a court-appointed expert concluded in 1991 that "there remain[ ] significant problems and noncompliance . . . most significantly, unnecessary institutionalization." *Id.* *Wyatt* squarely contradicts Petitioner's claim (at p. 7) that "Alabama has a long history of providing support, rehabilitation and protection for individuals with disabilities."

New York's Long Island Development Center was dismally described by a federal judge: "[V]isits by the court to the Center revealed a deplorable situation. Clients lay half-naked and unattended in their own urine and feces on cold floors in dismal surroundings while untrained attendants watched television. The facility's inadequate professional personnel failed to provide suitable training or educational programs for residents. Entry into the institution often led to swift physical and emotional deterioration and loss of skills. The huge population of some fifteen hundred clients made effective management and control impossible." *Society for Good Will to Retarded Children v. Cuomo*, 745 F. Supp. 879, 879 (E.D.N.Y. 1990). Kentucky's Outwood Institution has been described as "atrocious." *Kentucky Ass'n for Retarded Citizens v. Conn*, 510 F. Supp. 1233, 1237 (W.D. Ky. 1980), *aff'd*, 674 F.2d 582 (6th Cir. 1982), *supplemental op.*, 718 F.2d 182 (6th Cir. 1983).

Congress knows that this state-sponsored discrimination has not stopped. The General Accounting Office revealed "serious quality-of-care deficiencies" in our nation's large public institutions for the mentally retarded. The most prevalent problems are "insufficient staffing, lack of active treatment, and deficient medical and psychiatric care." These problems have at times led to serious harm to residents, "including injury, illness, physical degeneration, and even death." General Accounting Office, *Medicaid – Oversight of Institutions for the Mentally Retarded Should be Strengthened* (Sept. 6, 1996).

B. Discrimination In Zoning And Public Housing

Outside state-run institutions, the states have excluded persons with disabilities from the community through discriminatory zoning laws and restrictions on public

housing. In 1996, a federal court bluntly concluded that "[c]ities . . . reacted to the deinstitutionalization movement in a manner similar to that of the postbellum Southern state governments that passed Jim Crow laws; they enacted restrictive zoning ordinances that precluded assimilation by the handicapped." *Epicenter, Inc. v. City of Steubenville*, 924 F. Supp. 845, 849 (S.D. Ohio 1996). At the time of the enactment of the ADA, this form of discrimination was extensive.[31]

Zoning discrimination continues today through several methods. Some subdivisions of the states have deliberately amended zoning laws to halt the establishment of group homes for the disabled.[32] Others have enacted zoning ordinances restricting the number of unrelated persons who

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31 *See, e.g., Cleburne*, 473 U.S. at 450 (holding that a city ordinance requiring the operator of a group home for the mentally retarded to obtain a special use permit violates the equal protection clause); *J.W. v. City of Tacoma*, 720 F.2d 1126, 1127 (9th Cir. 1983) (holding that the city's refusal to issue a special use permit to the operator of housing for the mentally disabled violated the due process clause of the Fourteenth Amendment); *Burstyn v. City of Miami Beach*, 663 F. Supp. 528, 537 (S.D. Fla. 1987) (declaring unconstitutional several provisions of a city ordinance regulating disabled housing); *Stoner v. Miller*, 377 F. Supp. 177, 180 (E.D.N.Y. 1974) (finding unconstitutional a city ordinance that prohibited mentally ill persons from registering in hotels and boarding houses).

32 *See, e.g., ARC, Inc. v. New Jersey*, 950 F. Supp. 637, 639-41 (D.N.J. 1996) (invalidating discriminatory zoning law), *later proceeding at* 986 F. Supp. 261 (D.N.J. 1997); *Association for Advancement of the Mentally Handicapped, Inc. v. City of Elizabeth*, 876 F. Supp. 614, 617 (D.N.J. 1994) (same). *See also Sunrise Dev., Inc. v. Town of Huntington*, 62 F. Supp. 2d 762, 774-75 (E.D.N.Y. 1999) (granting injunction against zoning law); *Assisted Living Assoc., L.L.C. v. Moorestown Township*, 996 F. Supp. 409, 414 (D.N.J. 1998) (same).

can reside in certain communities.[33] Still others have enacted dispersal and density laws limiting the establishment of group homes.[34] Another example of state-sponsored discrimination against persons with disabilities is "ugly laws," local ordinances that forbid people with "unsightly" or "disgusting" physical conditions from appearing in public.[35] These laws were part of the Congressional Record when the ADA was enacted.[36]

A review of judicial opinions shows that state and local public housing authorities have refused to rent to persons with physical and mental disabilities. For example, in *Cason v. Rochester Housing Authority*, 748 F. Supp. 1002, 1005 (W.D.N.Y. 1990), the Rochester Housing Authority

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33 *See, e.g., City of Edmonds v. Oxford House*, 514 U.S. 725, 728 (1995); *Smith & Lee Assocs. v. City of Taylor*, 102 F.3d 781, 786 (6th Cir. 1996); *Stewart B. McKinney Found., Inc. v. Town Planning & Zoning Comm'n*, 790 F. Supp. 1197, 1207 (D. Conn. 1992); *United States v. Schulykill Township*, No. 90-2165, 1990 U.S. Dist. LEXIS 15555, at *6-*7 (E.D. Pa. Nov. 16, 1990).

34 These statutes are set forth in the Appendix. *See, e.g.*, ARIZ. REV. STAT. § 36-582 (1999) (requiring 1,200 feet between homes for the disabled) (App. 16); ARK. CODE ANN. § 20-48-606 (Michie 1999) (3,000 feet) (App. 23); CONN. GEN. STAT. § 8-3f (1999) (1,000 feet) (App. 45); MICH. COMP. LAWS § 5.2961(16a) (1999) (1,500-3,000 feet) (App. 142); N.J. REV. STAT. § 40:55d-66.1 (1995) (1,500 feet) (App. 180); N.C. GEN. STAT. § 168-22 (1999) (half-mile) (App. 195); WIS. STAT. § 60.63 (1999) (2,500 feet) (App. 269). One commentator has described density limits as "among the most irrational legislative reactions to the establishment of homes for people with mental disabilities." Arlene S. Kanter, *A Home of One's Own: The Fair Housing Amendments Act of 1988 and Housing Discrimination Against People with Mental Disabilities*, 43 AM. U. L. REV. 925, 977 n. 313 (1994).

35 *See, e.g.*, CHICAGO MUN. CODE § 36-34 (1966); COLUMBUS GEN. OFFENSE CODE 2387.04 (1972); OMAHA MUN. CODE 25 (1967).

36 S. Rep. No. 101-116, at 7 (1989).

denied an applicant housing because she had a "need for a wheelchair" and was "incontinent." In *Hunter v. Trenton Housing Authority*, 698 A.2d 25, 26 (N.J. Super. Ct. App. Div. 1997), a physically disabled man was denied permission by the Trenton Housing Authority to build (at his own expense) a wheelchair ramp to enter his apartment.[37]

III. STATES INTERFERE WITH THE RIGHT OF PERSONS WITH DISABILITIES TO FORM FAMILIES

A. States Have Forcibly Sterilized Persons With Disabilities

The Court has repeatedly recognized that the right to control one's ability to procreate, "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child," is fundamental. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *accord Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992). The Court has also recognized a fundamental right to bodily integrity under the due process clause. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 269 (1990).

The states share a long and shameful history of depriving persons with disabilities of the right and ability to procreate. By the early 1930s, more than thirty states had enacted sterilization laws permitting the involuntary sterilization of persons in state institutions, including "the

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37 *See also, e.g., Majors v. Housing Auth.*, 652 F.2d 454, 454 (5th Cir. 1981) (public housing operator refused to waive its no pet policy to accommodate a disabled tenant); *Adapt v. Philadelphia Hous. Auth.*, No. 98-4609, 2000 U.S. Dist. LEXIS 5380, at * 1 (E.D. Pa. Apr. 14, 2000) (city public housing authority failed to provide enough handicapped accessible public housing units).

feeble-minded, "epileptics," "idiots," "morons," "mental defectives," "socially inadequate," "the diseased," "alcoholics," "manic-depressives," "schizophrenics," and "mentally enfeebled paralytics."[38] Between 1907 through 1963, those laws were used by the states to sterilize at least 60,000 persons.[39] In its infamous decision of *Buck v. Bell*, 274 U.S. 200, 205-07 (1927), the Court explicitly endorsed the involuntary sterilization of a seventeen-year old girl.[40]

The states' reasons for legalizing and carrying out sterilizations of persons with disabilities were to eradicate a group of persons who allegedly "burdened" society. The eugenics-motivated state actions have never had a valid justification.[41] Far from leading the people into enlightenment, as Petitioner and its *amici* would lead this Court to believe,[42] the states have been responsible for some

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38 Many examples of these statutes are set forth in the Appendix. *See generally* Phillip R. Reilly, *The Surgical Solution: A History of Involuntary Sterilization in the United States* 45-55 (1991); Harry H. Laughlin, *Eugenical Sterilization in the United States* (American Eugenics Soc'y 1926).

39 Reilly, *supra* note 38, at 94.

40 *See* Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30, 31 (Apr. 1985).

41 In Michigan, Ted Aslin and his brother, Fred, were involuntarily sterilized at the age of 18 by the state of Michigan in 1944 because they were "feeble-minded morons." After their release, Fred and Ted went on to raise adopted sons. For more than a decade, Ted Aslin has acted as a licensed foster parent to approximately 100 children. *20/20: Breeding Better Citizens: Forced Sterilization of Americans Believed to Have Some Mental Defect* (ABC television broadcast Mar. 22, 2000).

42 *See* Pet. Br. at 38-39 (states have been "overprotecting the constitutional rights of the disabled"); Brief of *Amicus Curiae* of Hawaii, et al., at 10 (states "are generally held up as positive examples").

of the most horrible discrimination against persons with disabilities.

B. State Discrimination Regarding The Right to Marry

The right to marry has long been considered fundamental. *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923). Marriage is one of the "basic civil rights of man." *Skinner v. Oklahoma,* 316 U.S. 535, 541 (1942). Nevertheless, persons with disabilities have faced state-imposed restrictions upon their right to marry. For example, Connecticut law provided that, "No man or woman, either or whom is epileptic, imbecile, or feeble-minded, shall intermarry, or live together as husband and wife, when the woman is under forty-five years of age." 1895 CONN. PUB. ACTS 667. By 1914, thirty-seven states and the District of Columbia had laws restricting marriage for persons who were "epileptic," "diseased," "insane," "lunatics," "imbeciles," "alcoholics," or "feeble-minded."[43]

The vast majority of states maintained such statutes into the present era.[44] For example, in 1987, Utah declared that marriage with "a person afflicted with acquired immune deficiency syndrome" is "prohibited and . . . void." UTAH CODE ANN. § 30-1-2(1) (1987). Relying on the ADA, a

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43 Stevenson Smith et al., *A Summary of the Laws of the Several States Governing (I) Marriage and Divorce of the Feebleminded, the Epileptic and the Insane, (II) Asexualization, (III) Institutional Commitment and Discharge of the Feebleminded and the Epileptic*, 82 BULL. U. WASH. 5-15 (May 1914).

44 Bruce Dennis Sales, et al., *Disabled Persons and the Law: State Legislative Issues* 16-20 (Plenum Press 1980) (as of 1980, 42 states and the District of Columbia had statutes restricting marriage for persons with disabilities).

federal court struck down the statute in 1993. *T.E.P. v. Leavitt*, 840 F. Supp. 110 (D. Utah 1993).

C. States Discrimination Against Parents With Disabilities

The right to raise one's children is protected by the Constitution. *Stanley v. Illinois,* 405 U.S. 645, 651 (1972). Balanced against this right is the state's interest in the welfare of the child. *Wisconsin v. Yoder,* 406 U.S. 205, 233-34 (1971). A review of state court decisions reflect a pervasive presumption that parents with disabilities are automatically unfit.[45] For example, a state court in Massachusetts approved an adoption against the will of the child's mother, who had been hospitalized several times for depression following the deaths of her father and uncle. The appellate court vacated the ruling, noting testimony that the woman was loving and caring to her child. *In re Petition of Worcester Children's Friend Soc'y,* 402 N.E.2d 1116 (Mass. App. Ct. 1980).

Courts have also applied the "best interests of the child" standard to find that a parent with disabilities is unfit. For example, in 1993, an Alabama court affirmed a father's loss of custody primarily because he was HIV-positive. *H.J.B. v. P.W.*, 628 So. 2d 753, 756 (Ala. Civ. App. 1993). A California trial court refused to permit an adoption of a child by a deaf couple, despite the uncontested supporting testimony of thirteen witnesses. The appellate court reversed the ruling, holding that "[t]here can be no doubt that the judge was biased and prejudiced against appellants . . . solely because they were deaf-mutes." *Adoption of Richardson,* 59

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[45] Most states have laws permitting the termination of rights of disabled parents. *See* Sales, *supra* note 44, at 459-66 (analyzing and critiquing guardianship statutes from all 50 states).

Cal. Rptr. 323, 327-29 (Ct. App. 1967). A Michigan trial court terminated a deaf woman's custody of her "two normal children," citing her deafness, forcing the appellate court to reverse. *Bednarski v. Bednarski,* 366 N.W.2d 69, 73 (Mich. Ct. App. 1985).[46] The stereotypes of state judges regarding the abilities of persons with disabilities to raise their children remain unchanged. Last year, a trial judge ordered that a blind father – a successful CEO of a computer company – must be accompanied at all times by a "responsible adult" while caring for his daughter, simply because of his disability. *Clark v. Clark,* 725 N.E.2d 100, 103 (Ind. Ct. App. 2000) (reversing trial court).

The sordid story of state-sponsored sterilization, and restrictions on marriage and parenting, is one of the most shameful chapters in our national history. These facts firmly refute the uninformed assertion by a handful of states that "the legislative record fails to reflect evidence of discriminatory – no less unconstitutional – conduct by states concerning the disabled."[47]

IV. STATES HAVE HISTORICALLY INTERFERED WITH THE RIGHTS OF DISABLED PERSONS TO VOTE

Voting is a fundamental political right, because it is preservative of all rights. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). "Undoubtedly, the right of suffrage is a

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46 *See also In re Marriage of R.R.*, 575 S.W.2d 766, 768 (Mo. Ct. App. 1978) (multiple sclerosis); *Moye v. Moye,* 627 P.2d 799 (Idaho 1981) (epilepsy); *Stewart v. Stewart,* 521 N.E.2d 956 (Ind. Ct. App. 1988) (HIV); *In re Marriage of Carney,* 598 P.2d 36, 40 (Cal. 1979) (quadraplegic); *In re Marriage of Levin,* 162 Cal. Rptr. 757 (Ct. App. 1980) (stroke).

47 Brief of *Amicus Curiae* of Hawaii, et. al., at 9.

fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964).

A. State-Sponsored Exclusion Of Voters With Disabilities

At the time of the enactment of the ADA, virtually every state had specific constitutional provisions, statutes, or case law that prohibited individuals with cognitive or emotional impairments from voting. (Many of these statutes are set forth in the Appendix.) Although disenfranchisement may be justified following a hearing on the issue, many states, however, routinely deny persons in institutions with lesser or temporary cognitive or emotional disabilities the right to vote without a specific finding that such persons are incompetent to do so.

For example, in *Boyd v. Board of Registrars of Voters*, 334 N.E.2d 629, 632 (Mass. 1975), institutionalized persons attempted to register to vote, but were refused because of their disability. The Supreme Judicial Court reversed. Similar discrimination persists to this day. In an action enjoined by the court, in *In re Absentee Ballots Cast By Five Residents of Trenton Psychiatric Hospital*, 750 A.2d 790, 793-94 (N.J. Super. Ct. App. Div. 2000), the Board of Election made no individualized competence inquiry but simply refused to credit the votes by residents of a mental hospital.

B. State Discrimination Against Persons With Disabilities On Election Day

On election day in virtually every state, many people with disabilities have been, and continue to be, denied the right to cast a ballot in their neighborhood polling place. The legislative history of the ADA reflected state-sponsored electoral discrimination. *See, e.g.,* 135 Cong. Rec. S10793 (daily ed. Sept. 7, 1989) (statement of Sen. Biden, recounting a constituent who had to crawl or hire an ambulance to vote); *id.* at S10753 (statement of Sen. Gore, criticizing "the tradition of blatant and subtle discrimination" of states to accommodate persons with disabilities on election day).

Such discrimination is pervasive and ongoing. For example, in 1996, fifty-nine percent of New Hampshire's polling places were physically inaccessible to people with disabilities.[48] A recent nationwide survey revealed that forty-seven percent of the respondents' polling places lacked an accessible path to the voting area and that fifty-two percent of the respondents' polling places lacked an appropriately sized booth for persons using wheelchairs.[49] A March 2000 survey found that only twenty-seven percent of Philadelphia's 1681 polling places were properly accessible.[50] Confronted with evidence that, in two New York counties, all polling places but one were inaccessible to persons with disabilities, a federal court ordered access to be

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48 Voting Rights Primary Access Committee, *Exercising My Right to Vote: The Accessibility of New Hampshire Polling Places to Citizens with Disabilities* (Apr. 1996).

49 Coalition for Accessible Political Elections, *Report of the National Voter Independence Project* (Feb. 1999).

50 Debra Auspitz, *Disabled Votes*, PHILADELPHIA CITY PAPER, Mar. 9-16, 2000.

made pursuant to the ADA. *New York v. County of Schoharie*, 82 F. Supp. 2d 19 (N.D.N.Y. 2000); *New York v. County of Delaware*, 82 F. Supp. 2d 12 (N.D.N.Y. 2000). Without the ADA and its attendant consequences for non-compliance, many states would simply continue their "tradition of blatant and subtle discrimination" against its citizens with disabilities.

V. STATES HAVE DENIED PERSONS WITH DISABILITIES EQUAL ACCESS TO THE COURTS

A. Until the ADA Was Enacted, States Routinely Excluded Disabled Jurors

"Whether jury service be deemed a right, a privilege, or a duty, the State may no more extend it to some citizens and deny it to others . . . than it may discriminate in the offering of the elective franchise." *Carter v. Jury Commission*, 396 U.S. 320, 330 (1970). "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Batson v. Kentucky,* 476 U.S. 79, 87 (1986). Nevertheless, when Congress passed the ADA, it was commonplace for the states to exclude persons with physical and mental disabilities from jury service without regard to their individual ability to function effectively as jurors.[51]

For instance, New York law excluded "infirm and decrepit" jurors for more than 150 years.[52] In 1984, an

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51 Examples of statutes barring service by jurors with disabilities are included in the Appendix (*e.g.*, App. 1, 15, 22).

52 *Lewinson v. Crews*, 282 N.Y.S.2d 83, 84-86 (App. Div. 1967) (excluding a blind college professor as a juror); *id.* at 87-88 (Hopkins, J., dissenting) (law in force since 1829), *aff'd*, 236 N.E.2d 853 (N.Y. 1968). New York courts continued to exclude blind persons from jury service

Alabama county "conceded that Shelby County is not equipped to accommodate jurors who have severe disabilities, and that Shelby County courts routinely excuse such persons from jury service, as do *all of the State's courts*." *Hill v. Shelby County,* 599 F. Supp. 303, 304 (N.D. Ala. 1984) (emphasis added). In 1978, an Arkansas federal judge found that "[i]mpairment of the senses, particularly the senses of sight and hearing, vitiates a person's ability to serve effectively as a juror." *Eckstein v. Kirby*, 452 F. Supp. 1235, 1243 (E.D. Ark. 1978). In 1985, the Missouri Supreme Court held that the categorical exclusion of "deaf, mute, deaf-mute, and blind persons from inclusion in the jury pool" was constitutional. *State v. Spivey*, 700 S.W.2d 812, 813 (Mo. 1985) ("We doubt that deaf persons have a community of attitudes or ideas."). The District of Columbia Superior Court continued to exclude all blind persons from jury service through 1993. *Galloway v. Superior Court*, 816 F. Supp. 12, 16 (D.D.C. 1993).[53]

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until the 1980s. *Jones v. New York City Transit Auth.*, 483 N.Y.S.2d 623, 625-26 (Civ. Ct. 1984); *Jackanin v. Carey*, 476 F. Supp. 420 (E.D.N.Y. 1979 (rejecting constitutional challenge to exclusion of blind juror), *aff'd mem.*, 633 F.2d 204 (2d Cir. 1980). Only with the passage of the ADA did the New York state courts cease excluding disabled persons solely because of their status and without regard to their individual abilities. *People v. Guzman*, 555 N.E.2d 259, 261 (N.Y. 1990).

53 Even where the state legislature amended the law to remove statutory exclusions of disabled persons, some state courts continued to exclude all deaf persons from jury service. For example, in *DeLong v. Brumbaugh*, 703 F. Supp. 399, 406 (W.D. Pa. 1989), a judge serving on the superior court for the State of Pennsylvania testified that "he would disqualify a deaf person under all circumstances."

B. States Have Also Excluded Disabled Litigants From Accessing The Courts

States have also historically denied persons with disabilities an equal opportunity to use the state courts as litigants in civil matters by failing to remove architectural and communications barriers that effectively exclude persons with mobility impairments or sensory impairments from using the court system. For example, in *Kroll v. St. Charles County,* 766 F. Supp. 744, 752 (E.D. Mo. 1991), the federal court found that the county court facilities were inaccessible to persons with disabilities, in violation of the ADA. Similarly, in 1984, Alabama officials admitted that its facilities were not properly accessible to litigants. *Hill*, 599 F. Supp. at 304.

The exclusion of persons with disabilities from court proceedings because of inaccessible court facilities has persisted since the passage of the ADA. In *Layton v. Elder*, 143 F.3d 469 (8th Cir. 1998), the Eighth Circuit concluded that the state of Arkansas had failed to provide sufficient accessibility to Montgomery County Courthouse, and that as a result, the quadriplegic plaintiff has been excluded from the state court system. *Id.* at 472.[54] In its 1997 report regarding the accessibility of the California court system to persons with disabilities, the California Judicial Council concluded that many California court buildings were not accessible to persons with disabilities, and that attitudinal barriers among

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54 *See also Matthews v. Jefferson*, 29 F. Supp. 2d 525, 533-34, 540 (W.D. Ark. 1998)(Marion County courthouse inaccessible; county "has excluded mobility impaired individuals from participation in its services, programs, [and] activities").

court personnel denied equal access to persons with disabilities.[55]

VI. STATES HAVE DENIED PERSONS WITH DISABILITIES THE RIGHT TO TRAVEL

The Constitution protects every citizen's right to travel from state to state. *See United States v. Guest*, 383 U.S. 745, 757 (1966). An integral part of this protection is the right of those moving to a new state to be treated equally in the new state of residence. *Saenz v. Roe*, 526 U.S. 489, 504-05 (1999). Many states, however, have affirmatively violated this constitutional right with regard to persons with disabilities by either prohibiting outright, or imposing substantial penalties upon, the entry of persons with disabilities into the states.

Historically, Alabama and other states forbade or restricted the entry of disabled persons. Alabama law banned the immigration of "persons suffering with contagious and communicable diseases, of cripples without means and unable to perform mental or physical service, of idiots, of lunatics, persons of bad character." 1907 ALA. LAWS 313 (App. 9). Missouri made it a crime to import or receive children "having any contagious or incurable disease or being of feeble mind or of vicious character" into the state. 1901 MO. LAWS 132 (App. 163). Mississippi provided that vessels bringing in any "infant, lunatic, maimed, aged, or infirm" person must post bond. 1906 MISS. LAWS 1011 (App. 160). Other states with similar requirements included California, (App. 35) Massachusetts (App. 192), and New York (App. 138). These laws are included in the Appendix. *See*

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55 *Summary of Survey and Public Hearing Reports of the Access for Persons with Disabilities Subcommittee of the California Judicial Council's Access and Fairness Advisory Committee* 8-10 (Jan. 1997).

generally Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1836 (Dec. 1993).

State governmental officials worried publicly that lax immigration policies were letting "defective" foreigners slip into the country and contaminate our gene pool.[56] A study by California's State Board of Charities and Corrections reported a strong "relation between race and mental deficiency." California State Bd. of Charities & Corrections, *Eighth Biennial Report*, 51 (1918). Noting that "the ratio of feeble-mindedness was far higher among Mexicans, Negroes, and recent immigrants from Europe than among those of native American stock," the Board concluded that "California has drawn a large proportion of immigrants of an undesirable type." *Id.* at 13-14, 19.

These types of exclusionary statutes are not just relics from the past. Until a few months ago, Utah authorized its counties to restrict the travel rights "of any . . . idiotic or insane persons not having a lawful settlement in such county," or "of persons afflicted with or who have recently been exposed to any contagious disease." UTAH CODE ANN. § 17-5-252 (1999) (repealed May 1, 2000).

VII. STATES HAVE DISCRIMINATED AGAINST CHILDREN WITH DISABILITIES

Education is a "principal instrument in awakening the child to cultural values, in preparing him for later . . . training, and in helping him to adjust normally to his

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56 "Recent census statistics show that 80 per cent of the feeble-minded children in the general population of the United States are the progeny of aliens or naturalized citizens." N.Y. TIMES, Feb. 18, 1912. *See generally* Reilly, *supra* note 38, at 66.

environment." *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954). As they have done with children of racial minorities, states have historically excluded and segregated children with disabilities from the public schools. Virtually every state has excluded children with disabilities from public education, even when state constitutions required all children to attend school.[57] As state officials in Georgia put it, "the fact of primary importance to remember is that a defective child will be a defective adult, and will die a defective. There is no philosopher's stone to turn the base metals of defect into gold."[58]

States regularly refused to educate children with disabilities, concluding that "[i]n the regular grades the feeble-minded and subnormal represent, as it were, an unassimilable accumulation of human clinkers, ballast, driftwood, or derelicts which seriously retards the rate of progress of the entire class and which often constitutes a positive irritant to the teach and the other pupils." J.E.W. Wallin, *The Education of Handicapped Children* (Houghton Mifflin, 1924) (*quoted in* M. Lazerson, *The Origins of Special Education* (1983)). New Mexico's constitution specifically excluded children with disabilities from public education: "Every child of school age *and sufficient physical and mental ability* shall be required to attend a public

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57 *See, e.g.*, IND. CONST. art. 8, § 1 (public schools must be "equally open to all"); MISS. CONST. art. 7, § 201 (public education required for all children between the ages of 6 and 21); N.D. CONST. art. 8, § 147 ("all children"). *See generally* Burgdorf, *A History of Unequal Treatment*, 15 SANTA CLARA LAWYER 855, 868 (1975); S. Sarason & L. Doris, EDUCATIONAL HANDICAP, SOCIAL POLICY AND SOCIAL HISTORY (1979).

58 Georgia Training School for Mental Defectives, Annual Report, at 4 (1922) (*quoted in* Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 403 (1991)). *See also* Weintraub & Abeson, *Appropriate Education for All Handicapped Children: A Growing Issue*, 23 SYRACUSE L. REV. 1037, 1057-58 (1972).

school." N.M. CONST. art. XII § 5 (2000) (App. 187). State courts historically upheld the exclusion of these unfortunate citizens.[59]

Congress has compiled an extensive record of state-sponsored discrimination against children with disabilities. In enacting the Education for All Handicapped Children Act of 1975, Congress compiled an extensive record of such discrimination. *See* 20 U.S.C. § 1400(b) (Supp. IV 1980). When it enacted the ADA, Congress likewise compiled many examples of invidious education-related discrimination against children with disabilities. For example, Congress was told of a child confined to a wheelchair who was refused admission to public school "because the principal ruled that [she] was a fire hazard." S. Rep. No. 101-116, at 7. One Senator testified that his deaf brother was told that his schooling would be limited to preparing him for one of only three occupations – cobbler, printer, or baker – and that this educational limitation led to a life of frustration and missed opportunities. *Hearings*, *supra* note 7, at 16 (statement of Sen. Harkin).

State segregation of children with disabilities was common in the 1980s and early 1990s. For example, a 1988 study showed that states prohibited between 10 percent to 55 percent of students with severe disabilities from attending their neighborhood schools. Meyer & Putnam, *Social Integration in* HANDBOOK OF DEVELOPMENTAL AND PHYSICAL DISABILITIES 107, 114 (V. B. Van Hasselt, P. Strain & M. Hersen, eds., 1988). A national organization on mental retardation reported that in 1992-93, only 7.1 percent

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[59] *See, e.g., State ex rel. Beattie v. Board of Educ.*, 172 N.W. 153 (Wis. 1919) (excluding physically disabled child with normal mental functioning); *Watson v. City of Cambridge*, 32 N.E. 864, 864 (Mass. 1893) (student "was too weak-minded").

of children with mental retardation received their education in regular classroom settings, and 56.8 percent of children with mental retardation were educated in separate classrooms, with little opportunity to interact with peers who did not have disabilities. *Report Card on Inclusion in Education of Children with Mental Retardation* (The Arc 1995). Even in the most recent years, states have continued to discriminate against children with disabilities.[60]

CONCLUSION

Alabama's claim (at p. 18) that "in passing the ADA, Congress did not identify any pattern or practice of unconstitutional state action, or for that matter even cite a single instance of such conduct," is simply wrong. Congress found that our society "is still infected by the ancient, now almost subconscious assumption that people with disabilities are less than fully human and therefore are not fully eligible for the opportunities, services, and support systems which are

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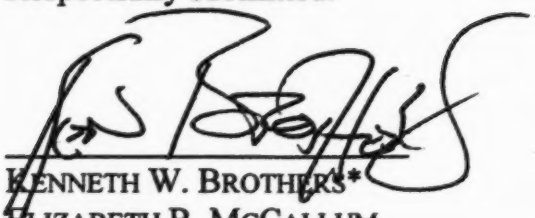
60 *See, e.g., Thomas ex rel. Thomas v. Davidson Academy*, 846 F. Supp. 611 (M.D. Tenn. 1994) (school illegally discriminated against expelled student because she had an autoimmune disease); *Martinez v. School Bd.*, 861 F.2d 1502 (11th Cir. 1988) (school improperly segregated a mentally-retarded student with AIDS by building a glass wall between her and the classroom); *Robertson v. Granite City Community Unit School District No. 9*, 684 F. Supp. 1002 (S.D. Ill. 1988) (granting preliminary injunction against school district that isolated first-grader with AIDS); *Doe v. Belleville Pub. Sch. Dist. No. 118*, 672 F. Supp. 342 (S.D. Ill. 1987) (exclusion of first-grader because he had AIDS); *Ray v. School Dist.*, 666 F. Supp. 1524 (M.D. Fla. 1987) (ordering school district to educate HIV-positive siblings to remain in school); *Hairston v. Drosick*, 423 F. Supp. 180 (S.D. W.Va. 1976) (exclusion of grade school child with spina bifida violated Rehabilitation Act of 1973, and due process clause of the Fourteenth Amendment); *In the Interest of H*, 218 N.W.2d 441, 445-46 (N.D. 1974) (although a "great many handicapped children in [North Dakota had received] no education at all, . . . [h]andicapped children are certainly entitled to no less than unhandicapped children under the explicit provisions of the [state] Constitution")

available to other people as a matter of right. The result is massive, society-wide discrimination." S. Rep. No. 101-116, at 106-07.

When it enacted the ADA, Congress had developed an extensive record proving that this "massive, society-wide discrimination" included widespread state-sponsored discrimination against persons with disabilities. This record amply supports the federal government's remedial power to ensure that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Respectfully submitted.



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In The
Supreme Court of the United States

UNIVERSITY OF ALABAMA AT BIRMINGHAM BOARD OF TRUSTEES, et al.,

Petitioners,

v.

PATRICIA GARRETT, et al.,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit

Appendix to Brief Of Morton Horwitz, Martha Field, Martha Minow And Approximately 100 Other Historians And Scholars, *Amici Curiae* In Support Of Respondents

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APPENDIX

COMPENDIUM OF STATE-SPONSORED DISCRIMINATION AGAINST PERSONS WITH DISABILITIES

In this Appendix, amici curiae have gathered a collection of state statutes, session laws, and constitutional provisions that illustrate pervasive state-sponsored discrimination against persons with disabilities, dating from the late nineteenth century through the time of the ADA's enactment and (in some cases) to the present. The collection is representative, rather than exhaustive. The provisions contained herein represent an historical perspective. Some of them remain in effect, and some do not. All emphasis has been added by amici.

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ALABAMA

Access To The Courts

ALA. CODE § 12-16-60 (1987): Qualifications of jurors.

(a) A prospective juror is qualified to serve on a jury if the juror is generally reputed to be honest and intelligent and is esteemed in the community for integrity, good character and sound judgment and also:

. . .

(3) Is capable by reason of **physical and mental ability** to render satisfactory jury service, and is **not afflicted with any permanent disease or physical weakness** whereby the juror is unfit to discharge the duties of a juror;

. . .

ALA. CODE § 12-21-165 (1987): Incompetent witnesses.

(a) Persons who have not the use of reason, such as **idiots, lunatics during lunacy** and children who do not understand the nature of an oath, are incompetent witnesses.

(b) The court must, by examination, decide upon the capacity of one alleged to be **incompetent from idiocy, lunacy, insanity, drunkenness or infancy**.

Institutionalization

ALA. CODE tit. 45, ch. 5, § 189 (1959): The Bryce hospital and the Searcy hospital named and set apart to the insane.

The Bryce hospital located in Tuscaloosa county and the Searcy hospital, located in Mobile county, named and established by law, for the care and treatment of **insane persons** in the state, are hereby continued under the management and control of the board of trustees of the Alabama state hospitals.

ALA. CODE tit. 45, ch. 5, § 204 (1959): Institutions used solely for **insane patients**.

The state hospitals shall be maintained and used solely for the care, treatment, and custody of such patients as have been committed to them as **insane** by a proper court. No other classes of patients shall be admitted.

ALA. CODE tit. 45, ch. 5, § 205 (1959): Insanity defined which renders person eligible as patient.

A person shall be adjudged **insane** who has been found by a proper court **sufficiently deficient** or **defective mentally** to require that, for his own or others' welfare, he be moved to the insane hospital for restraint, care and treatment. Whether the person's **mental abnormality** is sufficiently grave to warrant such procedure is always the question to be decided by the court.

ALA. CODE tit. 45, ch. 5, § 231 (1959): The Partlow state school for mental deficients.

There shall be upon or near the grounds of the Bryce hospital, near Tuscaloosa, Alabama, a school and home for **mental deficients or inferiors** as hereinafter defined, to be known as the Partlow state school for mental deficients, and referred to in this chapter as "the home."

ALA. CODE tit. 45, ch. 6, § 236 (1959): Mental inferiors and feeble-minded defined.

The following are declared to **be mental inferiors or deficients or feeble-minded**: All persons of whatever age, who are deficient or inferior to the extent of being classed in either of the following groups of the feeble-minded. That is to say, **idiots, imbeciles, feeble-minded or morons**, and any of whom may be, or may not be epileptics, but not violent or insane. The terms "**feeble-minded**" and "**mental inferior or deficient**" within the meaning of this chapter shall include **every person with such a degree of mental defectiveness from birth, or from an early age that he is unable to care for himself and to manage his affairs with ordinary prudence**, or that he is a **menace to the happiness or safety of himself or of others in the community**, and requires care, supervision, and control either for his own protection or for the protection of others. **It is specifically recognized that the greatest danger which the feeble-minded constitute to the community lies in the frequency of the passing on of mental defect from one generation to another**. Any person within the above named class, over the age of five years, and a resident of the state of Alabama for more than a year, may be committed to the home.

ALA. CODE tit. 45, ch. 6, § 239 (1959): Mental deficient, how committed to home.

The relative, guardian, or other person interested in an individual of the class herein defined as mental inferiors or deficients, or feeble-minded, desiring to commit such persons to the home may, if the person be under the age of twenty-one years, apply to the judge of the juvenile court, or where no juvenile court exists, to the probate judge of the county of such person's residence, and if over the age of twenty-one years to the probate judge of the county of such person's residence, for the commitment of such person to the Alabama home; and upon such application such judge to whom the application is made shall at once apply to the superintendent, with description on a form prescribed by the board of

managers of the home, and upon being advised by the superintendent that such applicant can be received, if a proper person, such judge shall examine three persons, one of whom must be a practicing physician, who are acquainted with the person sought to be committed, and with the condition of such person, and such judge if he is satisfied that the person is within the class herein defined as **mental inferiors or deficients**, or **feeble-minded**, and is otherwise eligible to admission into the home, shall make an order on a form prescribed by the board, committing such person to the home and arrange to have such person taken to the home, at the expense of the county if necessary. The judge of the juvenile court and the judge of probate to whom an application for commitment is made shall have full jurisdiction of the application and the person on whose behalf the application is made, and shall have the power and authority to commit such person to the home notwithstanding the family or relatives may object thereto; and when he has made an order of commitment and no member of the family or friend or guardian will convey the person so committed to the home his order of commitment shall be delivered to the sheriff of the county who shall at once convey such person to the home and deliver him to the authorities of the home, and shall in all things obey said order of commitment.

ALA. CODE tit. 45, ch. 6, § 246 (1959): Location of buildings of home.

The building of the home at Tuscaloosa, Alabama, shall be located by the superintendent of the Alabama insane hospitals by and with the consent and approval of the board of managers, on the most eligible site on the land around the Bryce hospital and **as far away from the hospital building as may be practicable**. And the board of managers is hereby authorized and empowered to purchase in the name of the state of Alabama any additional land lying near the land of

the Bryce hospital as may be found necessary for the proper location and conduct of the home.

ALA. CODE tit. 45, ch. 6, § 248 (1959): Arrangement and equipment of buildings.

The buildings for the home shall be located, built, and equipped so as to facilitate the **proper classification of residents according to age, sex, color and grade of deficiency or inferiority**; their employment and training in farming and gardening, mechanics or other useful industries or occupations and to make provisions for schools, church worship, amusement, and diversion that may be conducive to the health, happiness and moral and mental improvement of the inmates.

Managing Own Affairs

ALA. CODE § 26-7A-l (1975): Probate court; grounds.

Any probate court may appoint a curator to take charge of, manage and conserve the property of any person permanently or temporarily residing in this state, who shall become **physically incapacitated**, or **feeble-minded or epileptic or so mentally or physically defective** by reason of age, sickness, use of drugs, the excessive use of alcohol or for other causes that he or she is unable to take care of his or her property, and in consequence thereof, is liable to dissipate or lose the same, or to become the victim of designing persons.

Parenting

ALA. CODE § 26-10-3 (1987): Requirements as to consent of parents, etc.

No adoption of a minor child shall be permitted without the consent of parents, but the consent of a parent who has abandoned the child, who cannot be found, who is **insane or otherwise incapacitated** from giving such consent or who has lost guardianship of the child through divorce proceedings or by the order of a court having jurisdiction may be dispensed with, and consent may be given by the guardian, if there is one, or if there is no guardian, by the state department of human resources or by the licensed child-placing agency which has permanent custody of the said minor child by order of a juvenile court or a court of like jurisdiction.

. . .

Segregated Education

ALA. CODE § 21-1-8 (1987): Residential education and training programs for deaf, blind, etc., persons; cooperation by local school boards, state board of education, etc.

(a) The board of trustees of the Alabama Institute for Deaf and Blind is hereby authorized to provide for the **education and training of the deaf**, the **hearing impaired**, the **blind** and the **visually handicapped** in residential programs at **any location within the state**, with no limitations on the age of participants and no time limit on any participant.

. . .

ALA. CODE § 21-1-10 (1987): Attendance of blind, deaf or mute children between seven and 16 years of age -- Required.

It shall be the duty of any parent, guardian or other person having control of any deaf or blind child between the

ages of seven and 16 years and **so handicapped by deafness, blindness or inability to speak** as to be unable to make satisfactory progress in the public schools of the community in which such child resides **to enroll such child in the Alabama Institute for Deaf and Blind located at Talladega**, Alabama not later than five days after the opening of this school and to **keep such child in school during each scholastic year** for a term of 36 weeks, or for the length of the school term.

ALA. CODE § 21-1-12 (1987): Lists of deaf and blind children within counties; enforcement of attendance of children eligible for benefits of school.

It shall be the duty of the county superintendent of education in each county of Alabama to furnish annually to the attendance officer of his county and the president of the Alabama Institute for Deaf and Blind a **list of the deaf and blind children** of his county with the name, sex, age and address of each, together with the name and address of the parent or guardian of each child, such information to be secured from the school census enumeration books of the county or from any other reliable source, and the attendance officer shall visit the home of each child not later than five days after the opening date of the Alabama Institute for Deaf and Blind, as published by the president of this institution by giving written notice to each county superintendent of education and each city superintendent of education in Alabama. If it is found that any child eligible for the benefits of this school is not enrolled or is not exempt under the provisions of section 21-1-11, he shall serve legal notice on the parent, guardian or other person in control of such child, giving him five days in which to enroll said child in the Alabama Institute for Deaf and Blind. In the event of the failure or refusal of such parent, guardian or other person in charge to enroll said child, he shall proceed against such parent, guardian or other person as though said child were a

hearing or seeing child and shall follow the law as set forth in section 16-13-193.

ALA. CODE § 21-3-4 (1987): Compilation of lists of children having malformations.

The county health officer shall make a list of all children in the county who have any **congenital or acquired malformations**. In order to make this list, he shall avail himself of any information on birth certificates concerning congenital or acquired malformation, any information relative to **crippled children** in the biennial school census, any information he can procure from practicing physicians, the department of pensions and security, the department of education or any other source.

Sterilization

ALA. CODE tit. 45, ch. 6, § 243 (1959): Treatment of inmates prescribed by assistant.

The assistant with the advice and consent of the superintendent shall prescribe for the treatment of the inmates of the [Partlow State School for Mental Deficients], and if after consultation with the superintendent, they deem it advisable they are **hereby authorized and empowered to sterilize any inmate**.

Travel

ALA. CODE § 32-6-7 (1987): Persons to whom license not to be issued.

A driver's license shall not be issued to the following persons:

. . .

(5) Any person adjudged **insane or an idiot, imbecile, epileptic or feebleminded**, until restored to competency by judicial judgment, or released from a hospital for the insane or feeble-minded, upon certification by the superintendent or medical director that such person is competent, nor then, unless the director of public safety or examining officer is satisfied such person is competent to drive a motor vehicle with safety to persons and property;

(6) Any person afflicted with or suffering from a **physical or mental disability** which, in the opinion of the director of public safety or examining officer will prevent such person from exercising reasonable and ordinary control over a motor vehicle.

1907 Ala. Acts 313:

SECTION 1. *Be it enacted by the legislature of Alabama,* That the immigration board for the State of Alabama is hereby created, to consist of the governor, who shall be chairman of said board, the commissioner of agriculture and industries, and one immigration commissioner.

. . .

SEC. 7. *Be it further enacted,* That the immigration board shall use all lawful means to prevent the induction into this State of immigrants of an undesirable class, and to this end shall investigate the conditions of the applicants for admission through the department, so as to discourage the coming in of persons of an anarchistic tendency, of paupers, of **persons suffering with contagious or communicative diseases**, of **cripples** without means and **unable to perform mental or physical service**, of **idiots**, **lunatics**, persons of bad character, or of any persons who are likely to become a

charge upon the charity of the State, and all such as will not make good and law-abiding citizens.

. . .

Voting

ALA. CONST. art. VIII, § 182 (Michie 1977): Certain persons disqualified from registering and voting.

The following persons shall be disqualified both from registering, and from voting, namely:

All **idiots and insane persons**

. . .

ALASKA

Institutionalization

ALASKA STAT. § 831 (Michie 1905):

Commissioners appointed by the judges of the district court in the District of Alaska, pursuant to existing laws, shall, as ex officio probate judges and in the exercise of their probate jurisdiction have the power, and it shall be their duty, in their respective districts, to commit, by warrant under their hands and seals, all persons, adjudged insane in their districts to the asylum or sanitarium provided for the **care and keeping of the insane** of the District of Alaska. No person shall be adjudged **insane** or committed as such, except upon and pursuant to the following proceedings, to wit: Whenever complaint in writing is made by **any adult person** to a commissioner that there is an **insane person** at large in the commissioner's district, the lie commissioner shall at once cause such **insane person** to be taken into custody and to be brought before him, and he shall then immediately summon and impanel a jury of six male adults, residents of the district to inquire, try, and determine whether the person so complained of is really insane. The members of said jury shall, before entering upon the discharge of their duty, each take an oath to diligently inquire, justly try, and a true verdict render, touching the **mental condition of the person charged with being insane**. Before entering upon such trial the commissioner shall appoint some suitable person to appear for and represent in the proceeding the person complained of as insane. And in case there is a physician or surgeon in the vicinity who can be procured, the commissioner shall cause such surgeon or physician to examine the person alleged to be insane, and after such examination to testify under oath before the jury in respect to

the mental condition of said person. The commissioner shall preside at said hearing and trial. All witnesses that may be offered shall be heard and shall be permitted to testify under oath in said matter, amid after having heard all the evidence the said jury shall retire to agree upon a verdict, and if the jury unanimously by their verdict in writing find that the said person so charged with being insane as aforesaid is **really and truly insane** and that he ought to be **committed to the asylum or sanitarium** aforesaid and the commissioner approves such finding, he shall enter a judgment adjudging the said person to be insane and adjudging that he be at once conveyed to and thereafter properly and safely kept in the said asylum or sanitarium until duly discharged therefrom by law. The commissioner shall thereupon under his hand and seal, issue his warrant, with a copy of said judgment attached, for the commitment of said insane person to the asylum or sanitarium aforesaid, which warrant shall be delivered to the marshal of the division in which said proceedings are had, and shall direct said marshal to safely keep and **deliver said insane person to said asylum or sanitarium** and the said marshal, for the service of process in connection with and the guarding and transportation of the insane, shall be compensated from the same source and in the same manner as in the case of prisoners convicted of crime.

. . .

ALASKA STAT. § 832 (Michie 1905):

There is hereby established at Fairbanks, in the Territory of Alaska, and at Nome, in the Territory of Alaska, respectively, **a detention hospital for temporary care and detention of the insane**, wherein all insane and other patients in charge of the United States marshal shall be detained until transported to the asylum provided by law for their permanent care and cure, or **otherwise disposed of** as provided by the laws of the United States;

. . .

Segregated Education

ALASKA STAT. § 14.30.340 (Michie 1987): When not required to enroll.

A handicapped child may not be required to enroll in a special education program if the parent or guardian of the child certifies to the satisfaction of the school board of the public school system where the child resides that the child is receiving adequate educational advantages. A child shall be **excused from the compulsory education requirements** if a physician certifies in writing that the child's **bodily, mental or emotional condition** does not permit attendance at school.

Travel

ALASKA STAT. § 47.30.410 (Michie 1987): Persons subject to extradition.

A person alleged to be of **unsound mind** found in this state, who has fled from another state, shall, on demand of the executive authority of the state from which the person fled, be delivered up to be removed to the state where, at the time of the flight the person:

(1) was under detention by law in a hospital, asylum or other institution for the **insane** as a person of **unsound mind**;

(2) had been determined by legal proceedings to be of **unsound mind**, the finding being unreversed and in full force and effect, and the control of the person having been

acquired by a court of competent jurisdiction of the state from which the person fled; or

(3) was subject to detention in that state, which was then the person's legal domicile (personal service of process having been made) based on legal proceedings there pending to have the person declared of **unsound mind**.

Voting

ALASKA CONST. art. V, § 2 (1998): Disqualification.

No person may vote who has been convicted of a felony involving moral turpitude unless his civil rights have been restored. **No person may vote who has been judicially determined to be of unsound mind** unless the disability has been removed.

ARIZONA

Access To The Courts

ARIZ. REV. STAT. ANN. § 21-312 (West 1988): Drawing of names.

The jury commissioner shall conduct the drawing by shaking the master jury box or rotating the master jury wheel so as to mix thoroughly the slips of paper upon which names were written, and he shall publicly draw from the master jury box or master jury wheel the number of names designated in the order. If, after drawing the entire number required, the name of any person has been drawn who is dead or **insane** or who has permanently removed from the county in the knowledge of the jury commissioner or any other person attending the drawing, an entry of the fact shall be made in the minutes of the drawing and the corresponding slip destroyed.

. . .

Employment

ARIZ. REV. STAT. ANN. § 38-292 (West 1988): Notice of vacancy in office.

When an officer is removed, declared **insane** or convicted of a felony or an offense involving a violation of his official duties, or when his appointment is declared void, the body, judge or officer before whom the proceedings were had shall give notice thereof to the officer empowered to fill the vacancy.

Housing Discrimination

ARIZ. REV. STAT. § 36-582 (1999): Residential facilities; zoning; notice; appeal.

A. Unrelated persons living together notwithstanding, a residential facility which serves **six or fewer** persons shall be considered a residential use of property for the purposes of all local zoning ordinances if such facility provides care on a twenty-four hour per day basis. The residents and operators of such a facility shall be considered a family for the purposes of any law or zoning ordinance which relates to the residential use of property. The limitation of six or fewer persons does not include the operator of a residential facility, members of the operator's family or persons employed as staff, except that the total number of all persons living at the residential facility shall not exceed eight.

. . .

H. No residential facility shall be established within a **twelve hundred foot radius** of an existing residential facility in a residential area.

I. Prior to the establishment of a residential facility in a residential area, the department shall give at least **sixty days written notice to the local government unit affected**. The government unit shall have the right to contest the establishment of a residential facility in a residential area by written objection filed with the department within thirty days after receiving notice and may request an administrative hearing pursuant to title 41, chapter 14, article 3.

J. Other **residential facilities which serve seven or more persons shall be a permitted use in any zone in which residential buildings of similar size, containing rooms or apartments which are provided on a continuing**

basis for compensation, are a permitted use. Nothing in this section shall be construed to prohibit any city or country from requiring a conditional use permit in order to maintain a residential facility serving seven or more persons, provided that no conditions shall be imposed on such a facility which are more restrictive than those imposed on other similar dwellings in the same zones.

. . .

Institutionalization

1929 Ariz. Sess. Laws ch. 96:

Be It Enacted by the Legislature of the State of Arizona:

Section 1. There is hereby created **an institution for the care and education of mentally defective** children in the State of Arizona, which shall be known as the Arizona Children's Colony hereinafter called the colony.

. . .

Section 10. The following persons, if not **insane**, shall be held and be determined to be **mentally deficient**, and be entitled to enter said colony, providing such children shall have been residents of Arizona for one year immediately prior to proceedings looking to admission, and providing such children are not hospitalization cases.

(a) Children, residents of Arizona not over the age of 21 years, who are so **mentally deficient** that they are incapable of managing themselves and their affairs independently with ordinary prudence, or of being taught to do so, and who require supervision, control, care and education, for their own welfare, or for the welfare of others, or for the welfare of the community.

(b) Those not over 21 years of age, whose intelligence in the judgment of one or more psychiatrists or physicians, when they have been examined by such psychiatrists or physicians, making use of standard psychological tests and whatever supplementary tests may be available, will not develop without such care, the mental capacity of the average child.

. . .

Section 12. Any parent or guardian of a **mentally defective child**, or if such child have no parent or guardian, **any reputable citizen residing in the county, may file a petition with the juvenile department of the superior court**, setting forth:

(a) The relation of such child to petitioner.

(b) The name, age, sex, and residence of such child.

(c) A concise statement of the child's mental and physical condition.

(d) If known, whether the child has any estate, property or means for support.

(e) In whose custody the child now is, and where, and the length of time it has resided in Arizona.

Such petition shall be verified by the petitioner.

Section 13. Upon the filing of such petition, the court shall make an order setting such petition for hearing in chambers, shall fix the time of such hearing at least five days in advance of such hearing and given notice of such time and place of hearing to the parents or person having custody or control of such child, which notice shall be served upon such persons having custody or control of such child by the

probation officer of the county. Notice of the time and place of the hearing shall also be gives to the examiners appointed by the court.

Section 14. Upon the day of hearing the court shall have said child examined, if it has not already been examined, by the said examiners; shall hear any testimony offered and shall determine whether said child is a fit subject to be placed in said Arizona Children's Colony. If the court does so find, it shall then make and sign an **order of commitment** committing said child to the said Arizona Children's Colony; otherwise said child shall be discharged.

. . .

Section 20. If at any time the superintendent of any state institution reports to the Board that there is a child in such institution which is **mentally defective** as defined by this act and which should be a member or inmate of the colony, then such superintendent may request an examination by the examiners in the county where any such institution is located, and if the examiners report that such child is **mentally defective** and should be in said colony, a petition showing such facts shall be filed with the court committing any such child to such institution, and the court may thereupon order such child transferred from such institution to the colony.

. . .

ARIZ. REV. STAT. ANN § 1-215 (West 1988): Definitions.

In the statutes and laws of the state, unless the context otherwise requires:

. . .

Section 16. "Mentally ill person" includes an **idiot**, an **insane person**, a **lunatic** or a **person non compos.**

Segregated Education

ARIZ. CONST. art. XI, § 1 (1988): Public school system; establishment and maintenance; elements; education of the deaf, dumb, and blind.

The Legislature shall enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system, which system shall include kindergarten schools, common schools, high schools, normal schools, industrial schools, and a university (which shall include an agricultural college, a school of mines, and such other technical schools as may be essential, until such time as it may be deemed advisable to establish separate State institutions of such character.) The Legislature shall also enact such laws as shall provide for the education and care of the **deaf**, **dumb**, and **blind**.

Sterilization

1929 Ariz. Sess. Laws ch. 44:

Be It Enacted by the Legislature of the State of Arizona.

Section 1. Whenever the superintendent of the State Hospital for the Insane shall be of the opinion that it is for the best interests of the patients and of society that any inmate of the institution under his care should be **sexually sterilized**, such superintendent is hereby authorized to perform, or cause to be performed by some capable physician or surgeon, the operation of sterilization on any such patient confined in such institution, afflicted with **hereditary forms of insanity** that are recurrent, **idiocy**, **imbecility**, **feeble-mindedness**, or

epilepsy; provided, that such superintendent shall have first complied with the requirements of this act.

. . .

Voting

ARIZ. CONST. art. VII, § 2 (1988): Qualifications of voters; disqualification.

. . .

No person under guardianship, non compos mentis, or insane, shall be qualified to vote at any election, nor shall any person convicted of treason or felony, be qualified to vote at any election unless restored to civil rights.

ARKANSAS

Access To The Courts

ARK. CODE ANN. § 16-31-102 (1987): Disqualifications.

(a) The following are disqualified to act as grand or petit jurors:

. . .

(2) **Mentally retarded** or **insane** persons;

. . .

(6) Persons whose senses of hearing or seeing are substantially impaired;

. . .

1994 Ark. Acts No. 4, § 6:

It is hereby found and determined by the General Assembly that Arkansas Code 16-31-102 disqualifies from acting as a juror any person who is **mentally retarded** or **insane**, and **any person whose sense of hearing or seeing is substantially impaired**; this act eliminates those disqualifications and in their place disqualifies from jury service persons who by reason of a **physical or mental disability** are unable to render jury services with the exception that no person may be disqualified solely on the basis of loss of hearing or sight; this modification to Arkansas Code 16-31-102 will bring Arkansas law into compliance with federal law; and this act should go into effect immediately in order to allow those persons to begin serving as grand or petit jurors as soon as possible.

Therefore, an emergency is hereby declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall be in full force and effect from and after its passage and approval.

Housing Discrimination

ARK. CODE ANN. § 20-48-606 (Michie 1999): Regulations – Density control.

(a) The division shall promulgate regulations pursuant to the Arkansas Administrative Procedure Act, § 25-15-201 et seq., which shall encompass the following matters:

(1) (A) Limits on the number of new Family Homes I and II to be permitted on blocks, block faces, and other appropriate geographic areas taking into account the existing residential population density and the number, occupancy, and location of similar community residential facilities serving persons in drug, alcohol, juvenile, child, parole, and other treatment programs as well as any other dissimilar facilities such as **public housing**, soup kitchens at churches, and boarding homes.

(B) **Density limits** as follows:

City Population	Total Number of Homes I and II
1,000 or fewer	1
1,001 -- 9,999	1 for every 2,000
10,000 -- 49,000	1 for every 3,000
50,000 -- 249,000	1 for every 10,000
250,000 --	1 for every 20,000

(C) There shall be **three hundred feet (300') between family homes** unless otherwise permitted by local ordinance. There shall be **three thousand feet (3,000')**

between family homes in cities over thirty thousand (30,000) population unless otherwise permitted by local ordinance.

. . .

(4) (A) Procedures by which any resident of a residential zoning district or the governing body of a political subdivision in which a Family Home I or II is or is to be located may **petition the division to deny an application** for a license to operate a Family Home I or II on the grounds that the operation of the home would be in violation of the limits established pursuant to subdivision (1)(A) or under subdivision (1)(B) of this section or that the proposed location is an area of high risk to the health and safety of the residents of the family home.

(B) Petitions claiming the high risk area basis for denial must set forth and document one (1) or more of the following high risk rationales:

(i) High crime area;

(ii) Close proximity to stored hazardous materials;

(iii) Dangerous traffic pattern;

(iv) Frequent flooding;

(v) Insufficient fire protection.

. . .

Institutionalization

ARK. CODE ch. 89 (1904): Institutions of the State, Charitable, and Educational. Subchapter V. Insane Asylum.

Sec. 4179. There shall be established at the city of Little Rock an institution for the care and management of the insane in this state, to be organized and governed as provided in this chapter. The care and management thereof shall he under a board of trustees, appointed, organized and empowered as provided in sections 4129-4134.

Sec. 4192. Immediately after the appointment by the court of any guardian for a **lunatic** or **insane** person, such, guardian shall take steps to have the person thus placed in his charge admitted into said asylum.

Sec. 4193. Any citizen of the state of Arkansas, or resident of said state, who may be, or hereafter become, **insane**, may be admitted to the state insane asylum as a patient, proper proof having been made and proceedings had according to the provisions of this chapter.

Sec. 4194. Whenever it shall appear that any person entitled to admission to the state insane asylum is **insane**, **any reputable citizen of the state** may file a written statement with the county and probate judge of the county in which such supposed insane person may reside, which statement shall be substantially as follows:

I, _____ _____, hereby certify that _____ _____, a citizen or resident of _____ county, state of Arkansas, is, to the best of my belief, insane, and that he (or she) ought to be committed to the state insane asylum for care and treatment, as his (or her) being at large is dangerous to the community, or prejudicial to his (or her) chances of recovery from his (or her) condition of mental disorder.

[Signed.] _____

Sworn to and subscribed before me this —— day of _____, 190—. [Signed.]

County and Probate Judge.

. . .

Sec. 4209. All persons found to be **insane**, for whom application for admission to the state insane asylum shall be made in compliance with the provisions of this chapter, shall be classified as "acute,'' "chronic," "probably incurable" or "incurable," such classifications to be determined by the duration of the disease and such complications as are known to render recovery doubtful or impossible. All cases of less than one year's duration from first recognized symptoms of insanity, shall be classified as "acute;" all cases over one year's duration shall be classified as "chronic;" all cases complicated with **epilepsy**, **original imbecility** or **feeble mindedness**, **deformities of skull from injuries**, old age or **general paralysis**, shall be classified as "probably incurable;" and all other cases shall be classified as "incurable;" provided, that no person of either classification, whether curable or not, and **whether the imbecility or insanity be idiotic or congenital or not**, shall be refused admission as long as there is unoccupied room for patients in the asylum.

1917 Ark. Acts 172: AN ACT to provide an institution for the care and training of the feeble-minded, and for other purposes:

Be it Enacted by the General Assembly of the State of Arkansas:

Section 1. That an institution to be known as the **Arkansas School for the Feeble-Minded**, is hereby created, to be under the direction and control of the Board of Control for the State Charities of Arkansas.

Section 2. That the officers, commissions and boards controlling the several institutions of the State may transfer

to the School for the Feeble-Minded such **feeble-minded inmates** of their own institutions as may be more appropriately taken care of in the new institution.

. . .

Section 10. That until other and more specific legislation shall be enacted for the **control and the commitment of the feeble-minded**, the existing laws of this State now governing the issue shall apply, in so far as they are applicable and are not in conflict with this Act. But no person shall be committed to the School for the Feeble-Minded without the consent of the superintendent of that institution. Voluntary commitments to the institution may be made, with the consent of the superintendent, providing all expenses of the inmate shall be paid.

Section 11. That for administrative purposes, the term **feeble-minded** shall be taken to include **all degrees of mental defect due to arrested or imperfect mental development**. Those feeble-minded persons possessing approximate mental development not to exceed that of a normal child of three, shall be classed as **idiots**; those approximately of the mentality of children from four to ten inclusive, shall be known as **imbeciles**; and those approximately with the mental development of normal children from eight to twelve, inclusive, shall be known as **morons**.

. . .

Section 13. That all laws and parts of laws in conflict with the provisions of this Act are hereby repealed; that this Act is necessary for the public health, peace and safety, and that it shall take effect as an emergency measure, and be in force from and after its passage.

ARK. CODE ANN. § 20-47-103 (Michie 1987): Sanity inquest.

(a) If **any person** shall give information in writing to the probate court that any person in his county is an **idiot, lunatic, or of unsound mind** and pray that an inquiry thereof be had, the probate court, if satisfied that there is good cause for the exercise of its jurisdiction, shall cause the person so charged to be brought before the court and inquire into the facts by a jury, if the facts are doubtful.

(b) The court, if just cause appear and at any time during the term at which an inquisition is had, may set aside the verdict and cause a new jury to be summoned to inquire into the facts. However, when two (2) juries concur in any case, the verdict shall not be set aside.

ARK. CODE ANN. § 16-55-102 (Michie 1987): Definitions.

(a) As used in this code unless the context otherwise requires:

(12) "Person of unsound mind" includes every person who is a **lunatic**, **idiot,** or who is **deranged**. . . .

Segregated Education

ARK. CONST. art. XIX, § 19 (1987): Deaf and dumb and blind and insane persons.

It shall be the duty of the General Assembly to provide by law for the support of institutions for the education of the **deaf and dumb and the blind**, and also for the treatment of the **insane**.

Travel

ARK. CODE ANN. § 12-11-110 (1987): Drunken, insane, and disorderly persons.

(a) It shall be the duty of all peace officers to arrest any **insane** or drunken person, whom they may find at large and not in the care of some discreet person, and take him before some magistrate of the county, city, or town in which the arrest is made.

. . .

Voting

ARK. CONST. art. III, § 5 (1987): Idiots and insane persons.

No **idiot** or **insane person** shall be entitled to the privileges of an elector.

CALIFORNIA

Access To Courts

CAL. CIV. PROC. CODE § 198 (1872): A person is competent to act as a juror if he be:

. . .

2. In possession of his natural faculties and **not decrepit**;

. . .

Institutionalization/Sterilization

CAL. CODE § 2192 (1916): Petition to commit imbecile, etc., to home. Financial condition of parent.

Whenever any parent, guardian, or other person charged with the support of an **imbecile** or **feeble-minded person**, or any **idiot**, or **epileptic** who is not insane, desires him to be admitted into the **home for feeble-minded**, he may petition the superior court of the county in which he resides, for an order admitting such person to such hospital; provided, that any peace officer may petition said court for an order admitting such a person to such hospital. The judge must inquire into the condition or status of such person, and if he finds him to be an **imbecile, feeble-minded person**, **idiot** or **epileptic**, and that he has been a resident of the state for one year next preceding the presentation of the petition, such judge must make an order that he be received, maintained, and educated in such hospital, and on the presentation of such order the superintendent must receive him therein, if the hospital is not already full, or the fund available for its

support exhausted; but the **imbecile, feeble-minded person, idiot**, or **epileptic**, need not be received if, in the judgment of the management of the hospital or the commission, he is not a suitable subject for admission thereto.

. . .

Section 1. Before any person who has been lawfully committed to any state hospital for the insane, or who has been an inmate of the Sonoma State Home, and who is afflicted with **hereditary insanity** or **incurable chronic mania** or shall be released or discharged therefrom, the state commission in lunacy may in its discretion, after a careful investigation of all the circumstances of the case, cause such person to be **asexualized**, and such asexualization whether **with or without the consent of the patient** shall be lawful and shall not render the said commission, its members or any person participating in the operation liable either civilly or criminally.

. . .

Section 3. Any **idiot** if a minor, may be **asexualized** by or under the direction of the medical superintendent of state hospital, with the written consent of his or her parent guardian, and if an adult, then with the written consent his or her lawfully appointed guardian, and upon the written request of the parent or guardian of any such **idiot** or **fool**, the superintendent of any state hospital shall perform such operation or cause the same to be performed without charge therefor.

CAL. CODE § 2187 (1917): Transfer Of Patients [From One Hospital to Another].

. . .

The commission, when it deems it necessary, may transfer any inmate of the **home for feeble-minded** for care and treatment to a state hospital for the **insane** for care and treatment therein and the counties, guardian, relatives or friends of such inmate shall be liable for his care, support and maintenance in said hospital for the insane in the same manner and to the same extent as if the said patient were still an inmate of said home.

. . .

CAL. GOV'T CODE § 203 (West 1987): Custody and restraint of certain persons.

The State may establish custody and restraint of:

(a) **Mentally ill persons, insane persons,** chronic inebriates, and other **persons of unsound mind.**

. . .

Managing Own Affairs

CAL. CIV. CODE § 40 (West 1987): Persons of unsound mind adjudged incapable; powers; establishment of conservatorship; effect.

Subject to Section 1871 of the Probate Code, and subject to Part I (commencing with Section 5000) of Division 5 of the Welfare and Institutions Code, after his incapacity has been judicially determined a **person of unsound mind can make no conveyance or other contract, nor delegate any power or waive any right, until his restoration to capacity.**

. . .

Marriage

CAL. CIV. CODE § 69 (1951): Marriage license: Necessity: Contents: When not to be granted: Consent of parent or guardian: Examination of applicants: Forms for application and license.

All persons about to be joined in marriage must first obtain a license therefor, from a county clerk, which license must show:

. . .

No license must be granted when either of the parties, applicants thereof, is an imbecile, or insane, or is at the time of making the application, for said license, under the influence of any intoxicating liquor, or narcotic drug; and no license may be issued authorizing the marriage of a white person with a Negro, mulatto, Mongolian, or member of the Malay race.

. . .

CAL. CIV. CODE § 4201 (1987): License; necessity; contents; denial; under age applicants; forms; affidavit.

All persons about to be joined in marriage must first obtain a license therefor, from a county clerk, which license must show all of the following:

. . .

No license shall be granted when either of the parties, applicants therefor, is an imbecile, is insane, or is, at the time of making the application for the license, under the influence of any intoxicating liquor, or narcotic drug.

. . .

Parenting

CAL. CIV. CODE § 224 (1917):

A legitimate child can not be adopted without the consent of its parents if living, nor an illegitimate child without the consent of its mother if living, except that consent is not necessary in the following cases, to wit:

. . .

4. From a father or mother who has been declared either **feeble minded** or **insane** by the state commission in **lunacy** or by three competent persons appointed by said commission; provided, that if so declared insane, said father or mother shall have subsequently been determined to be **incurably insane** by the superior court of the county where he or she resides.

. . .

CAL. CIV. CODE § 232 (1987): Persons entitled to be declared free from parental custody and control.

(a) Description of person. An action may be brought for the purpose of having any child under the age of 18 years declared free from the custody and control of either or both of his or her parents when the child comes within any of the following descriptions:

. . .

(5) Person whose parents are declared to be **developmentally disabled** or **mentally ill**. Whose parent or parents have been declared by a court of competent jurisdiction, wherever situated, to be developmentally disabled or mentally ill, if, in the state or country in which the parent or parents reside or are hospitalized, the Director

of Mental Health or the Director of Developmental Services, or their equivalent, if any, and the superintendent of the hospital of which, if any, the parent or parents are inmates or patients, certify that the parent or parents so declared to be developmentally disabled or mentally ill will not be capable of supporting or controlling the child in a proper manner.

(6) Person whose parent or parents are **mentally disabled**. Whose parent or parents are mentally disabled and are likely to remain so in the foreseeable future. As used in this subdivision, "mentally disabled" means that a parent or parents suffer any mental incapacity or disorder which renders the parent or parents unable to adequately care for and control the child.

Travel

1852 Cal. Stat. 78:

. . .

SECTION 1. Within twenty-four hours after the landing of any passenger from any vessel arriving at any of the ports of this State, from any of the United States other than this State, or from any country out of the United States, the master or commander of the vessel from which such passenger or passengers shall have been landed shall make a report in writing, on oath or affirmation, to the mayor or chief municipal officer at such port (or in case of his absence or inability to serve, to the person discharging the duties of his office), which report shall state the name, place of birth, last legal residence, age and occupation of every person or passenger who shall have landed from such vessel in her last voyage to such port not being a citizen of the United States and who shall have within the last preceding twelve months arrived from any country out of the United States at any place within the United States, and who shall not have been

bonded or who have paid the commutation money according to the provisions of this act or any former act. The said report shall contain a like statement of all such persons or passengers as shall have landed or been suffered to land from any such vessel at any place during her said last voyage, or who shall have gone on board of any vessel with the intention of coming into this State. The said report shall further specify if either or any of said passengers or persons so reported are **lunatic**, **idiot**, **deaf**, **dumb**, **blind**, **crippled**, or **infirm** and, if so, whether they are accompanied by any relatives likely to be able to support them.

. . .

Voting

CAL. CONST. art. II, § 5 (1849):

No **idiot** or **insane person**, or person convicted of any infamous crime, shall be entitled to the privileges of an elector.

CAL. CONST. art. II, § 1 (1879):

Every native male citizen of the United States, every male person who shall have acquired the rights of citizenship under or by virtue of the treaty of Queretaro, and every male naturalized citizen thereof, who shall have become such ninety days prior to any election, of the age of twenty-one years, who shall have been a resident of the State one year next preceding the election, and of the county in which he claims his vote ninety days, and in the election precinct thirty days, shall be entitled to vote at all elections which are now or may hereafter be authorized by law; provided, no native of China, **no idiot**, **insane person**, or person convicted of any infamous crime, and no person hereafter convicted of the

embezzlement or misappropriation of public money, **shall ever exercise the privilege of an elector in this State.**

COLORADO

Housing Discrimination

COLO. REV. STAT. § 31-23-303 (1999): Legislative declaration.

. . .

(II) The general assembly declares that the establishment of owner-occupied or nonprofit group homes for the exclusive use of not more than eight persons sixty years of age or older per home is a matter of statewide concern. The general assembly further finds and declares that it is the policy of this state to enable and assist persons sixty years of age or older who do not need nursing facilities, and who so elect, to live in normal residential surroundings, including single-family residential units. Group homes for the aged shall be distinguished from nursing facilities, as defined in section 26-4-103 (11), C.R.S., and institutions providing life care, as defined in section 12-13-101 (5), C.R.S. Every municipality having adopted or which shall adopt a zoning ordinance shall provide for the location of group homes for the aged. **A group home for the aged established under this paragraph (b) shall not be located within seven hundred fifty feet of another such group home**, unless otherwise provided for by the municipality. Nothing in this paragraph (b) shall be construed to exempt such group homes from compliance with any state, county, or municipal health, safety, and fire codes. On April 29, 1976, every person sixty years of age or older who resides in a skilled or intermediate health care facility and who may be transferred or discharged therefrom to a group home for the aged shall not be so discharged or transferred unless he has received ninety days' advance written notice thereof or has agreed in writing to the proposed transfer or discharge.

(b.5) The general assembly declares that the establishment of state-licensed group homes for the exclusive use of mentally ill persons as that term is defined in section 27-10-102, C.R.S., is a matter of statewide concern and that a state-licensed group home for eight persons with mental illness is a residential use of property for zoning purposes, as defined in section 31-23-301 (4). **A group home for persons with mental illness established under this paragraph (b. 5) shall not be located within seven hundred fifty feet of another such group home**, unless otherwise provided for by the municipality. No person shall be placed in a group home without being screened by either a professional person, as defined in section 27-10-102 (11), C.R.S., or any other such mental health professional designated by the director of a facility, which facility is approved by the executive director of the department of human services pursuant to section 27-1-103, C.R.S. Persons determined to be not guilty by reason of insanity to a violent offense shall not be placed in such group homes, nor shall any person who has been convicted of a felony involving a violent offense be eligible for placement in such group homes. The provisions of this paragraph (b. 5) shall be implemented, where appropriate, by the rules of the department of public health and environment concerning residential care facilities for the mentally ill. Nothing in this paragraph (b.5) shall be construed to exempt such group homes from compliance with any state, county, or municipal health, safety, and fire codes.

. . .

Institutionalization

COLO. REV. STAT. § 4125 (1911): Definition of term "Lunatic."

The term **lunatic**, as used in this chapter, shall be construed to include **idiots**, **insane** and **distracted persons**, and every person who by reason of intemperance, or any disorder or unsoundness of mind, shall be incapable of managing and caring for his own estate.

COLO. REV. STAT. § 4127 (1911): Proceedings to commit insane person at large.

Whenever **any reputable person** shall file with the county court a complaint duly verified (or whenever complaint duly verified shall be filed with the county court by an authorized medical examiner, as hereinafter provided) alleging that any person in said county is so **insane** or **distracted in his mind**, as to **endanger his own person and property or the person and property of another, or others if allowed to go at large**, the county court, or the judge thereof, shall forthwith issue an order in the name of the people, directing any person who shall be appointed by said county or judge, or any officer of said court, to execute the same by immediately taking such patient into custody; *Provided,* That when any sheriff or constable shall find within his county any such **insane** person at large, it shall be his duty to apprehend such **insane** person without an order of court; and when any alleged Insane person shall be so arrested by or without an order of court, he or she shall be taken forthwith before the county court or the judge thereof and if the alleged insane person so elect, an inquest as provided for in section 1 shall be held without delay and until the determination of such inquest, such alleged insane person shall be confined in a hospital or if there is no suitable hospital in said county, in some convenient and suitable place to be designated, by the said court or judge. If upon such inquest it shall be found in the verdict of the jury that such alleged insane person is so **insane** or **distracted in mind**, as to endanger his or her own person or property, or the person or property of another or others, if allowed to go at large, it

shall be the duty of the county court to order that the patient be immediately transferred to the state insane asylum.

Managing Own Affairs

COLO. REV. STAT. ch. 8, § 4126 (1911): Contracts of lunatics void--Party dealing with guilty of swindling.

All contracts, agreements, and credits with or to any such **lunatic**, shall be **absolutely void** as against such person, his or her heirs, or personal representatives; but persons making such contracts or agreements with any such **lunatic** shall be bound thereby at the election of his or her conservators.

. . .

COLO. REV. STAT. § 27-10-125 (1975): Imposition of legal disability--deprivation of legal right—restoration.

(1) When **any interested person** wishes to obtain a determination as to the imposition of a legal disability or the deprivation of a legal right for any person who is **mentally ill**, **gravely disabled**, **mentally retarded**, as defined in section 27-10.5-102(8), **developmentally disabled**, as defined in section 27- 10.5-102(4), or **insane**, as defined in section 16-8-101, C.R.S.1973, and who is not then subject to proceedings under this article, part 3 or part 4 of article 14 of title 15, or article 3 of title 26, C.R.S.1973, he may petition the district court, or in the city and county of Denver the probate court, for a specific finding as to such disability or right.

. . .

Segregated Education

COLO. REV. STAT. § 22-80-101 (1990): School located at Colorado Springs.

There shall be permanently maintained in the city of Colorado Springs, in the county of El Paso, an **institution for the support and education of the deaf and the blind** residing within the state of Colorado.

COLO. REV. STAT. § 22-80-102 (1990): Educational institution.

The Colorado school for the deaf and the blind, located in the city of Colorado Springs, in the county of El Paso, is declared to be one of the educational institutions of the state of Colorado and **has for its object the education of the children of the state who, by reason of the impairment of their sense of hearing or of sight, cannot be advantageously educated in the other schools or educational institutions of the state**. Said school shall not be regarded or classed as a reformatory or charitable institution.

COLO. REV. STAT. § 22-80-109 (1990): Who may be admitted.

Every **blind deaf** or **mute** citizen of the state of Colorado under twenty-one years of age is entitled to receive an education in said school unless such person has a **physical or mental condition which would render his instruction impractical**. All applicants above the age of twenty-one years may be admitted at the option of the commissioner of education. Each school district shall report on June 1 of each year to the superintendent of the Colorado school for the deaf and the blind the name, age, and post-office address of every blind or deaf person of suitable age who is eligible for admission to said school and residing in its district, including

all such persons as may be **too deaf or blind to acquire an education in the public school.**

CONNECTICUT

Access To Courts

CONN. GEN. STAT. ANN. § 51-217 (West 1988): Qualification of Jurors.

(a) All jurors shall be electors, or citizens of the United States who are residents of this state having a permanent place of abode in this state and appear on the list compiled by the Jury Administrator under subsection (b) of section 51 -222a, who have reached the age of eighteen. A person shall be disqualified to serve as a juror if such person

. . .

(8) **is incapable, by reason of a physical or mental disability, of rendering satisfactory juror service.** Any person claiming a disqualification under subdivision (8) of this subsection must submit to the Jury Administrator a letter from a licensed physician stating the physician's opinion that such disability prevents the person from rendering satisfactory juror service. In reaching such opinion, the physician shall apply the following guideline: A person shall be capable of rendering satisfactory juror service if such person is able to perform a sedentary job requiring close attention for six hours per day, with short work breaks in the morning and afternoon sessions, for at least three consecutive business days.

. . .

Housing Discrimination

CONN. GEN. STAT. § 8-3f (1999): Establishment of community residences for mentally retarded persons. Zoning approval required.

No community residence established pursuant to section 8-3e shall be established within **one thousand feet** of any other such community residence without the approval of the body exercising zoning powers within the municipality in which such residence is proposed to be established.

Institutionalization

1905 Conn. Pub. Acts. Ch. 196: An Act concerning Insane Paupers and Indigent Persons.

Be it enacted by the Senate and House of Reps in General Assembly convened:

SECTION 1. When any pauper in any town shall be **insane**, a selectman of such town may apply to the court of probate for the district wherein such pauper resides for his **commitment to a state hospital for the insane**, and said court shall appoint two reputable physicians, who shall fully investigate the facts of the case and report to said court; and if such physicians shall report that said pauper is **insane**, the court may order a selectman or some proper officer forthwith to take such pauper to one of the **state hospitals for the insane**, where he shall be kept and supported as long as may be requisite; and two dollars per week of the expense of his support shall be paid by the town whose selectman applies for said commitment, and the balance by the state.

SECTION 2. When an indigent person not a pauper is **insane**, application may be made **by any person** in his behalf to the court of probate for the district where he resides,

and said court shall appoint two reputable physicians, and a selectman of the town where said indigent person resides, who shall fully investigate the facts and report to said court; and such selectman shall include in his report a full statement of the facts relating to the residence of such indigent **insane** person, and his estimate of the value of such indigent **insane** person's estate so far as he can ascertain the same. If said court of probate, upon consideration of the report of said physicians and said selectman, is satisfied that such person is indigent and **insane**, and is a resident of any town within its jurisdiction, it shall order him to be taken by the person making the application, or such other person as it may direct, to one of the **state hospitals for the insane**, where he shall be kept and supported as long as may be requisite; and two dollars per week of the expense of his support shall be paid by the person making the application, and the balance by the state.

. . .

1909 Conn. Acts. Ch. 207: An Act providing for the Establishment of a Colony for Epileptics.

Be it enacted by *the Senate and House of Representatives in General Assembly convened:*

SECTION 1. There shall he established within this state a **colony for epileptics**, the object of which shall be the **scientific treatment, education, employment, and custody of epileptics** and which shall be known as the **Connecticut Colony for Epileptics**.

. . .

SECTION 12. No patient shall be discharged from said institution until, in the judgment of the superintendent, the mental and physical condition of such patient justifies his discharge.

. . .

1911 Conn. Pub. Acts. Ch. 211: An Act amending an Act concerning Commitment and Support of Imbeciles.

Be it enacted by the Senate and House of Reps in General Assembly convened:

Section 2787 of the general statues is hereby amended to read as follows: Whenever there shall be found in any town in the state any pauper or **indigent imbecile person who would be benefited by being sent to the school for imbeciles** at Lakeville, the selectmen of such town shall make application to the court of probate for the district in which such town is situated for the admission of such person to said school, and if, upon inquiry, said court shall find that such person is a proper subject to be received into said school, it shall order said selectmen to take such person to said school, to be kept and supported for such length of time as said court may deem proper. Said selectmen shall not take or commit any such person to said school until the order of said court has been approved by the governors, and no person shall be received at said school to be supported in any manner by the state without the approval of the governor. There shall be taxed by the comptroller two dollars and fifty cents per week for each week such person shall remain at said school, and the principal of said school shall make his bill therefore quarterly, and present it to the governor, upon whose approval it shall be paid by the state treasurer, and the **balance shall be paid by the relative or relatives liable for the support of such person**, or, if the person is a pauper, by the town in which such person belongs.

1913 Conn. Pub. Acts. Ch. 160: An act concerning the Establishment of an Institution for Imbeciles at Lakeville.

Be it enacted by the Senate and House of Reps in General Assembly convened:

SECTION 1. There shall be established at Lakeville an **institution for imbeciles**, the object of which shall be the **care, custody, maintenance, and education** of **imbeciles** resident of this state, and which shall be known as The Connecticut School for Imbeciles.

. . .

Marriage

CONN. GEN. STAT. § 1354-56 (1902): Marriage of epileptics and imbeciles.

SECTION 1354. Every man and woman, either of whom is **epileptic**, **imbecile**, or **feeble-minded**, who shall intermarry, or live together as husband and wife, when the woman is under forty-five years of age, **shall be imprisoned** not more than three years. But nothing herein contained shall be construed as affecting the mutual relations of any man and woman lawfully married on or before the thirty-first of July, 1895.

SECTION 1355. Procuring or aiding such marriage. Every person who shall advise, aid, abet, cause, or assist in procuring the marriage of the persons described in § 1354, knowing them or either of them to be **epileptic**, **imbecile**, or **feeble-minded**, shall be **fined** not more than one thousand dollars, or **imprisoned** not more than five years, or both.

SECTION 1356. Penalty for carnal knowledge in certain cases. Every man who shall carnally know any female under the age of forty-five years who is **epileptic**, **imbecile**, **feeble-minded**, or a pauper, shall be **imprisoned** not more than three years. Every man who is epileptic who shall

carnally know any female under the age of forty-five years, and every female under the age of forty-five years who shall consent to be carnally known by any man who is **epileptic**, **imbecile**, or **feeble-minded**, shall be **imprisoned** not more than three years.

Segregated Education

CONN. GEN. STAT. ANN. § 10-92 (West 1988): Education at Newington Children's Hospital.

Newington Children's Hospital shall maintain a program of education for the **physically handicapped** children under its control and care which shall be approved by the state board of education.

CONN. GEN. STAT. ANN. § 17-307 (West 1988): Care of handicapped and other children at Newington Children's Hospital. Children with drug-related conditions not to be admitted.

Newington Children's Hospital may admit any child who is **handicapped** or **afflicted with any pediatric illness** upon application of the selectmen of any town, or the guardian or any relative of such child, or any public health agency or physician, provided, no person shall be admitted primarily for the treatment of any drug-related condition. Said hospital shall admit such child to said hospital if such child is pronounced by the physicians on the staff of said hospital, after examination, to be suitable for admission, and said hospital shall keep and support such child for such length of time as it deems proper. Said hospital shall not be required to admit any such child unless it can conveniently receive and care for such child at the time application is made and said hospital may return to the town in which such child resides any child so taken who is pronounced by the physicians on the staff of said hospital, after examination, to

be unsuitable for retention or who, by reason of improvement in his condition or completion of his treatment or training, ought not to be further retained. The hospital may refuse to admit any child pronounced by the physicians on the staff of said hospital, after examination, to be unsuitable for admission and may refuse to admit any such child when the facilities at the hospital will not, in the judgment of said physicians, permit the hospital to care for such child adequately and properly.

Sterilization

CONN. GEN. STAT. § 2691 (1918): Operations to prevent procreation.

The directors of the State Prison and the superintendents of the state hospitals for the insane at Middletown and Norwich are authorized and directed to appoint for each of said institutions respectively two skilled surgeons, who in conjunction with the physician or surgeon in charge at each of said institutions, shall constitute a board the duty of which shall be to examine such inmates of said institutions as are reported to them by the warden, superintendent or the physician or surgeon in charge, to be persons by whom **procreation would be inadvisable**. Such board shall examine the physical and mental condition of such persons and their record and family history so far as the same can be ascertained, and if, in the judgment of a majority of said board, **procreation by any such person would produce children with an inherited tendency to crime, insanity, feeble-mindedness, idiocy or imbecility and there is no probability that the condition of any such person so examined will improve to such an extent as to render procreation by any such person advisable**, or if the physical or mental condition of any such person will be substantially improved thereby, then said board shall appoint

one of its members to perform the operation of **vasectomy** or **oophorectomy**, as the case may be, upon such person. Such operation shall be performed in a safe and humane manner, and the board making such examination and the surgeon performing such operation shall receive from the state such compensation for services rendered as the warden of the State Prison or the superintendent of either of such hospitals shall deem reasonable.

CONN. GEN. STAT. § 17-19 (1958): Operations to prevent procreation permitted in certain state institutions.

The directors of the State Prison and the superintendents of the state hospitals for mental illness, the superintendent of the Mansfield State Training School and Hospital and the superintendent of The Southbury Training School are authorized and directed to appoint for each of said institutions two skilled surgeons, who, in conjunction with the physician or surgeon in charge at each of said institutions, shall constitute a board the duty of which shall be to examine such inmates of said institutions as are reported to them, by the warden or superintendent or the physician or surgeon in charge, to be persons by whom **procreation would be inadvisable**. Such board shall examine the physical and mental conditions of such persons and their record and family history so far as the same can be ascertained, and if, in the judgment of a majority of such board, **procreation by any such person would produce children with an inherited tendency to crime, mental illness or mental deficiency and there is no probability that the condition of any such person so examined will improve to such an extent as to render procreation by any such person advisable**, or if the physical or mental condition of any such person will be substantially improved thereby, then such board shall appoint one of its members to perform the operation of **vasectomy** or **oophorectomy**, as the case may be, upon such person. Such operation shall be performed in a

safe and humane manner, and the board making such examination and the surgeon performing such operation shall receive from the state such compensation for services rendered as the warden of the State Prison or the superintendent of either of said hospitals or schools deems reasonable.

Voting

CONN. GEN. STAT. § 9-12 (1967): Who may be admitted.

(a) Each citizen of the United States who has attained the age of twenty-one years, who has resided in the town in which he applies for admission to the privileges of an elector at least six months next preceding the time he so applies, and who, at the time of so applying, is able to read in the English language any article of the constitution or any section of the statutes of the state and sustains a good moral character, shall, on taking the oath prescribed by law, be an elector. **No idiot or mentally ill person shall be admitted as an elector.**

CONN. GEN. STAT. ANN. § 9-12 (West 1988): Who may be admitted.

(a) Each citizen of the United States who has attained the age of eighteen years, and who is a bona fide resident of the town to which he applies for admission as an elector shall, on taking the oath prescribed by law, be an elector, except as provided in sections 9-19e, 9-30 and subsection (b) of this section. For purposes of this section a person shall be deemed to have attained the age of eighteen years on the day of his eighteenth birthday. **No mentally incompetent person shall be admitted as an elector.**

DELAWARE

Employment

DEL. CODE ANN. tit. 19, § 905 (1987): Wage rate for handicapped workers.

For any occupation, the Department may provide by regulations, after public hearing, upon reasonable notice, at which any person may be heard, for the employment of individuals whose earning capacity is **impaired by age or physical or mental deficiency** or injury at such wages lower than the minimum wage rate under this chapter as the Department may deem necessary or appropriate to avoid hardship or prevent curtailment of opportunities for employment. No employee shall be employed at wages fixed pursuant to this section except under special license issued under the applicable regulations of the Department. Such regulations shall, except as may be otherwise provided by the Department, take effect upon publication.

Housing Discrimination

DEL. CODE ANN. tit. 22, § 309 (1999): Residential facilities for developmentally disabled persons.

(a) For purposes of all local **zoning** ordinances a residential facility licensed or approved by a state agency serving 10 or fewer developmentally **disabled** persons on a 24 hour-per-day basis shall be construed to be a permitted single family residential use of such property.

(b) For purposes of this section a developmentally **disabled** person is a person with a **disability** resulting in substantial functional limitations in a person's major life

activities attributable to mental retardation, cerebral palsy, epilepsy or autism, attributable to any other condition found to be closely related to mental retardation because such condition results in similar impairment of general intellectual functioning or adaptive behavior to that of mentally retarded persons or requires treatment and services similar to those required for such persons, or attributable to a physical impairment.

(c) **No residential facility serving 10 or fewer developmentally disabled persons shall be established within a 5,000 foot radius of an existing, similar community residential facility in a residential area.**

Institutionalization

Del. Laws Ch. 172 (1918): Delaware Commission For The Feeble Minded. AN ACT to establish a Home for the care and training of the **feeble minded** of Delaware, and providing for the legal **commitment** of **feeble minded persons** and for other purposes.

Be it enacted by the Senate and House of Representatives of the State of Delaware in General Assembly met:

Section 1. That there shall be established in this State a home for the care and training of **feeble-minded persons**.

. . .

Section 8. Whenever any person, arrested in this State, shall be supposed to be **feeble-minded**, any relative of such person, or **any reputable citizen of the State**, at any time before the final disposition of the case, may present to the Court of General Sessions of the County, wherein said person was arrested, or to the resident Judge thereof in vacation, or to the Juvenile Court of the City of Wilmington,

a petition setting forth that such person is **feeble-minded**, and praying for the issuance of a rule to show cause why such person should not be committed to the custody of DELAWARE COMMISSION FOR THE FEEBLE MINDED. The petition shall be verified, by affidavit, which shall be sufficient if it states that it is based upon information and belief. Upon the filing of the petition, a rule shall be issued against the person, so arrested, and against the parent or parents, guardian or other custodian of such person, returnable at such time, not exceeding fifteen days thereafter, as shall be fixed by the Court, or Judge. Upon the return of the rule, the Court or Judge shall hear the witnesses in support of the rule, one of whom shall be a psychologist, or an expert on the subject of feeble-mindedness, and shall, also, hear any witnesses in opposition to said rule, and if it shall appear to the satisfaction of the Court or Judge that the person so arrested is **feeble-minded**, and that it would be for the best interests of such feeble-minded person, or of the community at large, the Court or Judge may direct that such feeble-minded person be committed to the custody of DELAWARE COMMISSION FOR THE FEEBLE MINDED until the further order of the Court, or Judge.

Section 9. Whenever any person shall be supposed to be **feeble-minded**, and, when by reason of such mental condition, or of existing social conditions, it would be **detrimental to any community** of this State to allow such person to remain at large, any relative of such person, or any reputable citizen of the State may present to the resident Judge of the County, wherein such person resides, a petition, setting forth that such person is **feeble-minded**, and setting forth the reasons why it would be **detrimental to the community** for such person to remain at large, and praying for the issuance of a rule to show cause why such person should not be committed to the custody of DELAWARE COMMISSION FOR THE FEEBLE MINDED. The petition shall be verified, by affidavit, which shall be sufficient if it

states that it is based upon information and belief. Upon the filing of the petition, a rule shall be issued against the person, so arrested, and against the parent or parents, guardian or other custodian of such person, returnable at such time, not exceeding fifteen days thereafter, as shall be fixed by the Judge. Upon the return of the rule, the Judge shall hear the witnesses in support of the rule, one of whom shall be a psychologist, or an expert on the subject of feeble-mindedness, and shall, also, hear any witnesses in opposition to said rule, and if it shall appear to the satisfaction of the Judge that such person is feeble-minded, and that it would be detrimental to the community for such person to remain at large, the judge may direct that such feeble-minded person be committed to the custody of DELAWARE COMMISSION FOR THE FEEBLE MINDED until the further order of the said Judge.

DEL. CODE ANN. § 5503 (1953): Home for feeble minded; control and management.

There shall be maintained in this State a home for the care and training of **feeble-minded persons**. The Commission shall have sole and complete control and management of the home.

DEL. CODE ANN. § 5521 (1953): Commitment of arrested person; procedure.

(a) Whenever any person, arrested in this State, shall be supposed to be **feeble-minded**, any relative of such person, or any reputable citizen of the State, at any time before the final disposition of the case, may present to the Superior Court of the county wherein the person was arrested, or to the Family Court for New Castle County, or to the Juvenile Court of Kent and Sussex Counties, a petition setting forth that such person is **feeble-minded**, and praying for the issuance of a rule to show cause why such person

should not be committed to the custody of the Delaware Commission for the Feeble-Minded. The petition shall be verified by affidavit, which shall be sufficient if it states that it is based upon information and belief.

. . .

DEL. CODE ANN. § 5522 (1953): Commitment of person not under arrest; procedure.

(a) Whenever any person shall be supposed to be **feeble minded**, and, when by reason of such mental condition, or of existing social conditions, it would be **detrimental to any community** of this State to allow such person to remain at large, any relative of such person, or any reputable citizen of the State may present to the Superior Court of the county wherein such person resides, or to the Family Court for New Castle County, or to the Juvenile Court of Kent and Sussex Counties, a petition, setting forth that such person is **feeble-minded**, and setting forth the reasons why it would be **detrimental to the community** for such person to remain at large, and praying for the issuance of a rule to show cause why such person should not be committed to the custody of the Delaware Commission for the Feeble-Minded. The petition shall be verified by affidavit, which shall be sufficient if it states that it is based upon information and belief.

. . .

DEL. CODE ANN. tit. 16, § 5321 (1987): Admission to Center.

No person shall be admitted to any department of the Center except as provided in § 5323 of this title or except as follows:

(1) Children between the ages of 3 and 18 years who are either seriously maladjusted or mentally ill and who are amenable to modern care and treatment shall be admitted to the Center upon the application of the parents or the surviving parent or legal guardian of any such child or any institution or agency having the care and custody of any such child or by the commitment of any court of this State having jurisdiction over such children;

(2) **Handicapped** or **crippled children**, including spastics, cardiacs and those afflicted with infantile paralysis, shall be admitted to the Center upon the application of the parents or the surviving parent or legal guardian of such children and in the event that both parents of such children are deceased and no legal guardian has been appointed, upon the application of any physician, institution or agency treating or having the care or custody of such children;

(3) No child shall be admitted to the detention department of the Center unless a court having jurisdiction over dependent, neglected, delinquent or maladjusted children commits any such child for the sole purpose of social, psychological and psychiatric study and examination;

(4) A child awaiting assignment to a foster home shall only be admitted upon the application of any public or private agency having the authority or function to place such children in such homes;

(5) No man or woman suffering from alcoholism or being a drug addict without psychosis, either acute or chronic, shall be admitted to the Center except upon the person's own application or the application of the person's parents, or the surviving parent or legal guardian or in the event of none such, upon the application of any physician or institution treating or having the care or custody of any such

person or by the commitment of any court of this State having jurisdiction over any such person;

(6) No person who is an **epileptic** without psychosis shall be admitted to the Center except upon his own application or upon the application of his parents or the surviving parent or legal guardian or in the event of none such, upon the application of any physician or institution treating or having the care or custody of any such person;

(7) No aged person who is bedridden and without frank psychosis and needing nursing care only shall be admitted to the Center except upon his own application or the application of the person or persons responsible for his support and maintenance or upon the application of any institution whether public or private having the care and custody of any such person;

(8) **Handicapped** or **crippled** adults, including spastics and those afflicted with infantile paralysis, shall be admitted to the Center upon their own application or upon the application of any practicing physician in good standing, for the purpose of observation, study and treatment;

(9) In all other cases, no person shall be admitted to the Center except in accordance and in compliance with the rules and regulations which are adopted by the Department of Health and Social Services or Department of Services for Children, Youth and Their Families governing the admissions to their respective sections within the Center.

Managing Own Affairs

DEL. CODE ANN. tit. 1, § 302 (1987): Definitions.

In the construction of this Code and of all other statutes of this State, unless the context requires a different meaning:

. . .

(11) "Mentally ill person" includes every **idiot, lunatic person**, or person non compos mentis.

Marriage

DEL. CODE ANN. tit. 13, § 113 (1987): Supplies of marriage licenses, books and other forms; form.

(a) Marriage licenses, other forms and books used in connection with the issuance of marriage licenses shall be furnished by the State Board of Health on request of the clerks of the peace.

(b) Judges shall supply certificates in whatever form they see fit to such divorced persons as they believe should receive them under this chapter.

(c) Superintendents of asylums for the **insane** shall supply certificates in whatever form they see fit to such persons as they believe should receive them under this chapter.

(d) In the case of an adult person who is on probation or parole from any court or institution, the chief officer of such court or institution, or such person as such officer may appoint to give consent to marry, shall supply such consent in whatever form he deems advisable to such applicants for marriage license as he believes may properly marry.

(e) Marriage licenses, books and forms shall be as prescribed by the State Board of Health or in this chapter.

Each page of the Marriage Record Books for the use of clerks of the peace shall be numbered serially before delivery to the clerks of the peace.

Parenting

DEL. CODE ANN. tit. 13, § 908 (1987): Right to consent. The right to give consent shall be as follows:

(1) If the parental rights of the parent or parents with respect to the child have been terminated through legal termination of parental rights or through legal guardianship, the consent shall be granted by the organization or individual in whom the parental rights exist at the time of the filing of the petition:

a. If the child to be adopted has been abandoned, legal termination of parental rights must precede the filing of the petition for adoption. The consent to the adoption shall then be granted by the organization or individual in whom the parental rights exist;

b. If a parent or person in whom the parental rights exist is legally incompetent by virtue of **insanity** or **feeblemindedness**. legal termination of parental rights must precede the filing of the petition for adoption. The consent to the adoption shall then be granted by the organization or individual in whom the parental rights exist.

. . .

Segregated Education

DEL. CODE ANN. tit. 14 § 203 (1987): Special schools.

The State Board of Education and the school board of any local reorganized school district, either separately or jointly, may establish special schools for children who are in need of education not provided for in regular classes or schools. Such schools may include, but are not limited to, schools for persons who are **orthopedically handicapped, socially or emotionally maladjusted, autistic**, or **mentally handicapped, educable or trainable**, or for persons who suffer **hearing or speech impairment**, or for persons who are truant or insubordinate.

DEL. CODE ANN. tit. 14, § 2705 (1987): Exemption of mentally or physically handicapped children from compulsory attendance requirements.

(a) Other provisions of this title notwithstanding, a child may be exempted from § 2702 of this title upon request of the parent, guardian or other person legally having control of that child when the request is supported by written documentation of a physician, psychiatrist, psychologist or neurologist as the case may require. The request and documentation shall be addressed to the superintendent of schools of the school district in which the person resides indicating that the person is **mentally or physically handicapped** to such an extent that attendance in a school program is impracticable or unsafe.

. . .

DEL. CODE ANN. tit. 14, § 3122 (1987): Identification and reporting of **handicapped person**.

Each school district shall be required to identify, locate and evaluate, or reevaluate, any person residing within the confines of that school district who is **handicapped**, regardless of the severity of the handicap, and who is in need of special education and related services. The State Board of Education shall provide through rules and regulations that a practical method for carrying out this section be developed. The identification system so developed shall provide information concerning the time and method of the evaluation or reevaluation of the **handicapped person** and shall indicate the training, education or related services he or she is receiving and the location of that training, education or related services. The system shall further indicate any instance in which the person is not receiving training, education or related services and the reason for that situation. Nothing in this chapter or the rules and regulations issued thereunder shall authorize or require medical treatment of any person who objects, or, in the case of a minor, whose parent or guardian objects thereto on religious grounds.

DEL. CONST. art. X, § 1 (1999): Establishment and maintenance of free public schools; attendance.

Section 1. The General Assembly shall provide for the establishment and maintenance of a general and efficient system of free public schools, and may require by law that every child, **not physically or mentally disabled**, shall attend the public school, unless educated by other means.

Sterilization

33 Del. Laws, ch. 62 (1923): AN ACT to provide for the **sterilization** of certain **mental defectives**.

Be it enacted by the Senate and House of Representatives of the State of Delaware in General Assembly met:

Section 1. Upon the written application of the Board or Commission having control of any State or County Institution which has charge of **insane, feeble minded** or **epileptic** persons, to the State Board of Charities, the said Board is hereby authorized to appoint one physician and one alienist of recognized ability whose duty it shall be in conjunction with the Superintendent of the Institution where such persons are cared for to examine into the mental and physical condition of the persons mentioned in said written request who are legally confined in such institutions and should such physician, alienist and superintendent unanimously determine that **procreation is unadvisable** it shall then be lawful, with the written consent of the State Board of Charities for the Board or Commission having the custody of such person so examined, to have such an operation performed on such person for the **prevention of procreation** as shall be decided by said physician and alienist as safest and most effective provided however, that before such operation shall be performed it shall be the duty of the Board or Commission having the custody of such person to give at least 30 days notice to the husband or wife, parent or guardian if the same shall be known and can be located and if unknown to the person with whom such inmate last resided if such person can be located.

. . .

DEL. CODE ANN. ch. 57 (1953): Sterilization Of Mental Defectives.

SECTION 5701. Application of State or county institution; procedure:

(a) Upon the written application of the board or commission having control of any State or county institution which has charge of **insane, feeble-minded** or **epileptic** persons, to the State Department of Public Welfare, the Department may appoint one physician and one alienist of recognized ability who shall, in conjunction with the superintendent of the institution where such persons are cared for, examine into the mental and physical condition of the persons mentioned in the written request who are legally confined in such institutions.

(b) Should the physician, alienist and superintendent unanimously determine that **procreation is inadvisable** then, with the written consent of the Department of Public Welfare, the board or commission having the custody of the person examined, may have such an operation performed on such person for the **prevention of pro-creation** as is decided by the physician and alienist as safest and most effective.

(c) Before the operation is performed, the board or commission having the custody of the person, shall give at least 30 days' notice in writing to the husband or wife, parent or guardian, if the same are known and can be located, and if unknown, to the person with whom such inmate last resided if such person can be located.

SECTION 5702. Report of Mental Hygiene Clinic or Superintendent of State Hospital; procedure:

(a) Upon the report and recommendation of the Mental Hygiene Clinic of the Delaware State Hospital at Farnhurst or the Superintendent of the Delaware State Hospital that any person who is confined in any institution within the State, which is supported in whole or in part by the State, or by any county thereof, or who is at large, is **feeble minded, epileptic** or is a **chronic** or **recurrent insane person**, the board of trustees or other governing body of the

institution in which such person is confined, or the State Board of Trustees of The Delaware State Hospital, if such person is at large, may make written application to the Department of Public Welfare for the **sterilization** of such person.

(b) Upon receipt of the application, accompanied by a copy of the report and recommendation of the Mental Hygiene Clinic or the Superintendent of the Delaware State Hospital, the Department of Public Welfare may proceed with the sterilization of such person, in accordance with the provisions of section 5701 of this title. Where any **mental defective**, coming within the provisions of this section, is at large the examining commission to be appointed by the Department of Public Welfare, as provided in section 5701 of this title, shall consist of two physicians and one alienist of recognized ability.

Travel

DEL. CODE ANN. tit. 21, § 2707 (1987): License qualifications.

(a) A Class A license shall not be issued to any person under the age of 16 years. A Class B or Class C license shall not be issued to any person under the age of 18 years nor to any person 18 years of age or older who has not had at least 1 year's previous experience as an operator of a motor vehicle.

(b) The Department shall not issue an operator's or chauffeur's license to any:

. . .

(4) Applicant who has previously been adjudged **mentally ill** or an **idiot, imbecile** or **feebleminded** and who

has not at the time of such application been restored to competency by judicial decree or released from a hospital for the mentally ill or feebleminded upon a certificate of the superintendent that such person is competent or then unless the Department is satisfied that such person is competent to operate a motor vehicle with safety to persons and property;

(5) Person when in the opinion of the Department such person is afflicted with or suffering from such **physical or mental disability or disease** as will serve to prevent such person from exercising reasonable and ordinary control over a motor vehicle while operating the same upon the highways;

(6) Person who is unable to understand highway warning or direction signs in the English language;

(7) Person who is subject to losses of consciousness due to **disease of the central nervous system**, unless such person furnishes the Department with the certificate of 2 physicians duly licensed to practice medicine and surgery that such person's infirmity is under sufficient control to permit him or her to operate a motor vehicle with safety to person and property. Each person licensed to operate a motor vehicle on the basis of such certificate shall furnish the Department with a new certificate each year not later than the anniversary date of the issuance of the license and not earlier than 45 days before said date which certificate shall show that on the basis of an examination within said period a physician duly licensed to practice medicine and surgery has determined that the infirmity remains under sufficient control to permit the person to operate a motor vehicle with safety to person and property. Except as provided below, if such certificate is not received by the Department within 7 days after the anniversary date of the license, the Department shall revoke said license and shall notify its holder. The above provision of this paragraph notwithstanding, if 2 physicians duly licensed in this State furnish the Department with a

certificate that the disease no longer requires treatment and that the person can reasonably be expected to suffer no further losses of consciousness on its account, the Department may find that the person need no longer submit annual certificates of his or her competence to operate a motor vehicle and shall notify the person accordingly. The Department may at its discretion retain medical consultants to advise it. No physician who examines a person and provides a certificate in good faith in accordance with this paragraph shall be subject to any civil or criminal liability on account of having provided the certificate.

. . .

Voting

DEL. CONST. art. V, § 2 (1987): Qualifications for voting; members of the Armed Services of the United States stationed within State; persons disqualified; forfeiture of right.

Section 2. . . . [N]o **idiot** or **insane person**, pauper, or person convicted of a crime deemed by law felony, or incapacitated under the provisions of this Constitution from voting, shall enjoy the right of an elector; . . .

DEL. CODE ANN. tit. 15, § 1701 (1987): Qualifications for registration as qualified voter.

Every applicant for registration shall be a qualified voter if he is a citizen of this State of the age of 18 years and upwards, or who will be 18 years old on or before the day of the general election next succeeding his registration, and is a bona fide resident of this State. No person in the military, naval or marine service of the United States shall become a resident of this State by being stationed in any garrison, barrack or military or naval place or station within this State;

and no **idiot** or **insane person**, person convicted of a crime deemed by law a felony, or person who shall have been rendered incapable of voting by reason of violating § 7 of Article V of the Constitution of this State for 10 years next following his conviction and sentence thereunder, shall be a qualified voter.

DEL. CODE ANN. tit. 15, § 1703 (1987): Duty of officers to notify departments of facts suggesting voter disqualification.

. . .

(b) All state, county and municipal agencies shall have the duty, when it comes to their attention that a person is an **idiot** or **insane** or a pauper, to notify immediately the department of the county in which the person is a resident and the State Election Commissioner.

DISTRICT OF COLUMBIA

Employment

D.C. CODE ANN. § 1-607.2 (1981): Special provisions for the physically handicapped and the developmentally disabled.

The Mayor may develop rules and regulations which authorize the inquiry into bona fide job-related qualifications which may affect persons with **physical handicapped** or **developmental disabilities**, prior to appointing such individuals under the authority of § 1-610.4 (2). Physically **handicapped** or developmentally disabled person who apply for positions under the authority of subchapters VIII and IX of this chapter **may be examined to assure that their level of skills is sufficient to meet minimal job qualifications**.

D.C. CODE ANN. § 36-203 (1981): Minimum wage and overtime compensation; workweek; wage orders.

(a) (1) Except as otherwise provided in paragraph (2) of this subsection, every employer shall pay to each of his employees:

. . .

(4) All **handicapped** workers shall be paid at a rate not less than the minimum wage, except in those instances where a certificate has been issued by the United States Department of Labor authorizing the payment of less than the minimum wage to **handicapped** workers under 29 U.S.C. § 214 (c).

. . .

Managing Own Affairs

D.C. CODE ANN. § 45-720 (1981): Conveyance and assurance by and for mentally handicapped following court order.

It shall and may be lawful to and for any person or persons, being **idiot, lunatic, or non compos mentis**, or for the committee or committees of such person or persons, in his, her, or their name or names, by the direction of the chancellor, signified by an order made, upon hearing all parties concerned, on the petition of the person or persons, for whom such person or persons, being **idiot, lunatic, or non compos mentis**, shall be seized or possessed in trust, or the mortgagor or mortgagors, or of the person or persons entitled to the monies secured by or upon any lands, tenements, or hereditaments, whereof any such person or persons being **idiot, lunatic, or non comps mentis**, is or are, or shall be seized or possessed by way of mortgage, or of the person or persons entitled to the redemption thereof, to convey and assure any such lands, tenements, or hereditaments, in such manner as the chancellor shall, by such order so to be obtained, direct, to any other person or persons; and such conveyance or assurance, so to be had and made as aforesaid, shall be as good and effectual in law, to all intents and purposes whatsoever, as if the said person or persons being **idiot, lunatic, or non compos mentis**, was or were, at the time of the making such conveyance or assurance, of sane mind, memory, and understanding, and not **idiot, lunatic, or non compos mentis**, or had by him, her, or themselves executed the same. All and every person and persons being **idiot, lunatic, or non compos mentis**, and only trustee or trustees, mortgagee or mortgagees, as aforesaid, or the committee and committees of all and every such person and persons, being **idiot, lunatic, or non compos mentis**, and only such trustee or mortgagee as aforesaid, shall and may be empowered and compelled, by

such order so as aforesaid to be obtained, to make such conveyance or conveyances, assurance or assurances, as aforesaid, in like manner as trustees or mortgagees of sane memory are compellable to convey, surrender, or assign their trust estates or mortgages.

D.C. CODE ANN. § 6-1601 (1981): Establishment of register; purpose.

That the Mayor of the District of Columbia shall establish and maintain a register of **blind** persons residing in the District of Columbia. Such register shall, under regulations prescribed by the Council of the District of Columbia, provide information of such nature as will or may be of assistance in the planing of improved facilities and services for **blind** persons and in the restoration and conservation of sight.

D.C. CODE ANN. § 6-1602 (1981): Persons required to file reports; confidentially of register and reports; statistical abstracts.

Each: (1) Health, educational, and social service agency or institution operating in the District of Columbia and having in its care or custody (either full or part time), or rendering service to, any **blind** person; (2) physician and osteopath licensed or registered by the District of Columbia who has in his professional care for diagnosis or treatment such a person; and (3) optometrist licensed by the District of Columbia who, in the course of his practice of optometry, ascertains that a person is **blind shall report in writing to the Mayor the name, age, and residence of such person and such additional information as the Council may, by regulation, require for incorporation in the register** referred to in § 6-1601. Such register and reports shall not be open to public inspection. The Mayor may make available in the form of statistical abstracts or digests information

contained in such register and reports if the identity of persons referred to in such register or reports is not disclosed in such abstracts or digests.

Marriage

D.C. CODE ANN. § 30-103 (1981): Marriages void from date of decree; age of consent.

The following marriages in said District shall be **illegal**, and shall be void from the time when their nullity shall be declared by decree, namely: (1) The marriage of an **idiot** or of a person adjudged to be a **lunatic**; . . .

FLORIDA

Housing Discrimination

FLA. STAT. ANN. § 419.001 (West 1999): Site selection of community residential homes.

(1) For the purposes of this section, the following definitions shall apply:

(a) "Community residential home" means a dwelling unit licensed to serve clients of the Department of Children and Family Services, which provides a living environment for 7 to 14 unrelated residents who operate as the functional equivalent of a family, including such supervision and care by supportive staff as may be necessary to meet the physical, emotional, and social needs of the residents.

. . .

(2) Homes of six or fewer residents which otherwise meet the definition of a community residential home shall be deemed a single-family unit and a noncommercial, residential use for the purpose of local laws and ordinances. Homes of six or fewer residents which otherwise meet the definition of a community residential home shall be allowed in single-family or multifamily zoning without approval by the local government, provided that such homes shall **not be located within a radius of 1,000 feet of another existing such home** with six or fewer residents. Such homes with six or fewer residents shall not be required to comply with the notification provisions of this section; provided, however, that the sponsoring agency or the department notifies the local government at the time of home occupancy that the home is licensed by the department.

(3) (a) When a site for a community residential home has been selected by a sponsoring agency in an area zoned for multifamily, the agency shall notify the chief executive officer of the local government in writing and include in such notice the specific address of the site, the residential licensing category, the number of residents, and the community support requirements of the program. Such notice shall also contain a statement from the district administrator of the department indicating the need for and the licensing status of the proposed community residential home and specifying how the home meets applicable licensing criteria for the safe care and supervision of the clients in the home. The district administrator shall also provide to the local government the most recently published data compiled that identifies all community residential homes in the district in which the proposed site is to be located. The local government shall review the notification of the sponsoring agency in accordance with the zoning ordinance of the jurisdiction.

(b) Pursuant to such review, the local government may:

. . .

3. **Deny the siting of the home**.

(c) The local government shall not deny the siting of a community residential home unless the local government establishes that the siting of the home at the site selected:

1. Does not otherwise conform to existing zoning regulations applicable to other multifamily uses in the area.

2. Does not meet applicable licensing criteria established and determined by the department, including requirements that the home be located to assure the safe care and supervision of all clients in the home.

3. **Would result in such a concentration of community residential homes in the area in proximity to the site selected, or would result in a combination of such homes with other residences in the community, such that the nature and character of the area would be substantially altered. A home that is located within a radius of 1,200 feet of another existing community residential home in a multifamily zone shall be an overconcentration of such homes** that substantially alters the nature and character of the area. A home that is located within a radius of 500 feet of an area of single-family zoning substantially alters the nature and character of the area.

. . .

Institutionalization

FLA. STAT. ch. 13, § 1200 (1914): Petition.

When it is supposed that a person, resident of this State, is **insane**, either **non compos mentis** or sufficiently **devoid of reason** to be incapable of self control, a petition signed by five reputable citizens, not more than one of whom shall be a relative of the person, setting forth that he or she is to each of the petitioners personally known and that their knowledge of the mental condition of the subject is sufficient to justify the belief that he or she is insane, and asking that examination be instituted and made as provided by law, may be presented to the county judge or judge of the circuit court having jurisdiction.

FLA. STAT. ch. 12 § 1195 (1914): Destitute lunatics to be delivered to the Sheriff, and notify superintendent of asylum, who shall send nurse for such lunatic; provisos.

If it shall appear that said **lunatic** or **insane person** is destitute, then the judge shall deliver such lunatic or insane

person to the sheriff for safe keeping, and shall notify the superintendent of the Hospital for the Insane of the State of Florida, and said superintendent shall send a nurse or some suitable person for such lunatic or insane person who shall transport him or her to the Hospital for the Insane of the State of Florida, and deliver him or her to the officer having charge of the same for the purpose of his or her care, custody and treatment. . . .

1919 Fla. Laws ch. 787: *Be It Enacted by the Legislature of the State of Florida:*

Section 1. That there is hereby established in this State of Florida Farm Colony for **Epileptic** and **Feeble-Minded**, to be located at some place to be designated by the Board of Commissioners of Sate Institutions, where sufficient arable lands may be had or secured upon which such Colony may be developed on the Cottage plan.

. . .

Section 8. The purpose of the Florida Farm Colony for Epileptic and Feeble-Minded shall be recognized as three-fold:

1st. As an asylum for the care and protection of **epileptic** and **feeble-minded**.

2nd. As a school for the education and training of the **epileptic** and **feeble-minded**.

3rd. As a colony for the **segregation** and employment of the **epileptic** and **feeble-minded**.

. . .

Managing Own Affairs

FLA. STAT. § 744.3215 (1999): Rights of persons determined incapacitated.

. . .

(2) Rights that may be removed from a person by an order determining incapacity include the right:

(a) To marry.

(b) To vote.

(c) To personally apply for government benefits.

(d) To have a driver's license.

(e) To travel.

(f) To seek or retain employment.

. . .

Voting

FLA. CONST. art. VI, § 4 (1995): Disqualifications.

(a) No person convicted of a felony, or adjudicated in this or any other state to be **mentally incompetent**; shall be qualified to vote or hold office until restoration of civil rights or removal of disability.

GEORGIA

Access to Courts

GA. CODE ANN. § 24-9-5 (1988): Persons without use of reason incompetent.

Persons who do not have the use of reason, such as **idiots, lunatics during lunacy**, and children who do not understand the nature of an oath, shall be incompetent witnesses.

Family

GA. CODE ANN. § 99-209 (1933): Children brought into State for placement; bond; notification; reports.

No person shall bring or send into the State any child for the purpose of placing him or procuring his adoption, without first filing notice with the Board of Control. He shall file with the Board a bond to the State for each he intends to send or bring, approved by the Board, in the penal sum of $1,000, conditioned that he will not send or bring into the State any child who is incorrigible or **unsound in mind or body**; that he will remove any such child who becomes a public charge or who, in the opinion of the Board, becomes a menace to the community prior to his adoption or becoming of legal age; that the person with whom the child is placed shall be responsible for his proper care and training. . . .

GA. CODE ANN. § 31-1-3.1 (1990): Reporting handicapped new persons; referral to treatment and rehabilitative services.

(a) It is the intent of the General Assembly to ensure the registration by the department of **handicapped newborn persons** in order that all such persons might obtain referral

and other services provided by existing state agencies, department, other organizations, and individuals.

(b) As used in this Code section, the term "handicapped newborn persons" means a person less than 12 months old who is **deaf**, **blind**, or has a **serious congenital defect** as defined by the department.

(c) Except as otherwise provided, every public and private health and social agency and every physician authorized to practice medicine in this state shall report to the department the name of any person such agency or physician has identified as being a handicapped newborn person. The report shall be made within 48 hours after identification of that person and shall contain the name, age, address, type and extent of handicap, social security number, if any and such other information concerning that person as the department may require.

(d) The department shall establish procedures whereby a handicapped newborn person for whom a report is made under this Code section shall be referred with informed consent to appropriate pubic or private departments or agencies for treatment and rehabilitative services.

. . .

Institutionalization

1919 Ga. Laws 379:

. . .

Section 3. There shall be admitted to the Georgia Training School for Mental Defectives the following type of persons: Any person with **mental defectiveness** from birth or from an early age, or those that become **mentally**

defective from injury or disease so pronounced that he or she is unable to care for himself or herself and manage his affairs with ordinary prudence, and that he constitutes a **menace to the happiness of himself or of others in the community**, and therefore requires care, supervision and control, either for his own protection or for the protection of others, and yet who is not **insane** or of **unsound mind**. This type of persons shall be known and designated as "Mental Defectiveness." Should the institution at any time not be able tot accommodate all who shall under the terms of Section 5 of this Act be admitted thereto, it is hereby provided that **preference in admission shall be given to children and women of child-bearing age.**

. . .

Marriage

GA. CODE § 677 (1910): Performing marriage ceremony illegally.

If any minister of the gospel, judge, or justice shall join together in matrimony any man and woman, without a license or publication of banns, as provided by law, or where either of the parties within his own knowledge shall be an **idiot** or **lunatic** or subject to any other disability which would render such contract or marriage improper and illegal, he shall be guilty of a misdemeanor.

Sterilization

1937 Ga. Laws 414:

[Providing for the compulsory sterilization of feeble-minded persons] for the protection of . . . future generations.

Voting

GA. CONST. art. II, § 1 (1998): Exceptions to right to register and vote.

. . .

No person who has been judicially, determined to be **mentally** incompetent may register, remain registered, or vote unless the disability has been removed.

GA. CONST. art. II, § 2 (1976): Registration of Electors; Who Disfranchised.

The General Assembly may provide, from time to time, for the registration of all electors, but the following classes of persons shall not be permitted to register, vote or hold any office, or appointment of honor, or trust in this State, to-wit: 1st. Those who shall have been convicted in any court of competent jurisdiction of treason against the State, of embezzlement of public funds, malfeasance in office, bribery or larceny, or of any crime involving moral turpitude, punishable by the laws of this State with imprisonment in the penitentiary, unless such persons shall have been pardoned. 2nd. **Idiots** and **insane persons**.

HAWAII

Access to Courts

HAW. REV. STAT. ANN. § 612-4 (Michie 1999): Grounds of qualification and disqualification.

. . .

(b) A prospective juror is disqualified to serve as a juror if the prospective juror (1) is incapable, by reason of the prospective juror's **physical** or **mental disability**, of rendering satisfactory jury service;

. . .

Institutionalization

1919 Haw. Sess. Laws Act 102: An Act providing for the establishment and maintenance of a home for **feeble-minded persons**, and for commitment and admission thereto.

. . .

Section 4. The following persons, if not **insane**, are held to be **feeble-minded**: Those that are so **mentally deficient** that they are incapable of managing themselves and their affairs independently with ordinary prudence or of being taught to do so, and who require supervision, control, and care, for their own welfare, for the welfare of others, or for the welfare of the community.

. . .

Section 6. Any person found by a court of competent jurisdiction to be feeble-minded may be committed to said home.

. . .

1919 Haw. Sess. Laws Act 131:

Section 1. The sum of twenty-one thousand five hundred dollars . . . is hereby appropriated, out of any moneys in the treasury of the Territory of Hawaii not otherwise appropriated, to be expended by the department of public instruction for the purpose of the construction of a school and other buildings and of providing instruction, maintenance, and transportation, and other necessities arising in connection within the training and instruction of **blind, deaf, dumb**, and other **defective or mentally defective children**, as the department of public instruction may deem proper.

. . .

1919 Haw. Sess. Laws Act 198:

Section 1. The sum of eight thousand dollars ($8,000.00) is hereby appropriated from the general revenues of the Territory for the construction and furnishing of a building or ward for the care and control of **insane persons** at the **leper settlement** in the county of Kalawao.

. . .

Segregated Education

HAW. REV. STAT. ANN. § 298-10 (Michie 1988): Attendance of blind or deaf children.

Every parent or guardian having control over any partially or totally blind or deaf person, from six to eighteen years of age, who by reason of partial or total blindness or deafness is **unable to obtain an education in the public or private schools**, shall send them to the state school for deaf and blind for a period corresponding to the regular school year, except where such attendance is excused by the superintendent of education or by a judge of a circuit court were, in the superintendent's or judge's opinion, the facts warrant such action; provided that this shall not apply to cases where skilled private instruction is given to such persons for the same length of the each year.

Voting

HAW. CONST. art. II, § 2 (1993): No person who is **non compos mentis** shall be qualified to vote . . . .

IDAHO

Access to Courts

IDAHO CODE § 19-1003 (1987): Grounds for challenge to individuals jurors.

A challenge to an individual grand juror may be interposed for one or more of the following causes:

. . .

3. That he is **insane**.

. . .

Institutionalization

1911 Idaho Sess. Laws 86: To provide for the establishment, building and equipping of the Idaho State Sanitarium for the care, protection, treatment and education of feeble-minded and epileptic persons; and the admission, support, transfer and discharge of its inmates.

. . .

Section 1. That a school for **feeble-minded** and **epileptic** persons, to be known as "The Idaho State Sanitarium", is hereby authorized to be located and established, in the manner hereinafter provided, at some point or place within twenty (20) miles of the State Capital.

. . .

Section 32. All **feeble-minded persons** who are residents of the State, whose **defects** prevent them from

receiving proper instruction and training in the public schools, and all **feeble-minded** and **epileptic** persons who are residents of the State, whose **defects** prevent them from properly taking care of themselves, may be admitted to said institution under such regulations and conditions as the Board of Directors may provide, and the provisions of this Act.

Section 33. Whenever it appears by affidavit to the satisfaction of a magistrate of the county that any person within the county is **so feeble-minded as to prevent such person from receiving proper instruction and training in the public schools**, or that any person within the county is so feeble-minded or epileptic as to prevent such person from properly taking care of himself, he must issue and deliver to some peace officer for service a warrant directing that such person be arrested and taken before any Judge of a Court of record within the county for examination.

. . .

Section 40. The Judge, after such examination and certificate made, if he believes the person to be so feeble-minded as to be unable to receive the proper instruction and training in the public schools, or so feeble-minded or epileptic as to be unable to properly care for himself or herself, must make an order that such person be confined in the Idaho State Sanitarium.

. . .

1911 Idaho Sess. Laws 97: Authorizing and directing the state board of education to cause to be erected a building near Gooding, Idaho for the use of the deaf and blind and as a part of the Idaho State school for the Deaf and the Blind.

. . .

Be It Enacted By the Legislature of the State of Idaho:

Section 1. That the State Board of Education is hereby authorized and directed to cause to be erected a building near Gooding, Idaho, for the use of the deaf and blind, to be a part of the Idaho State School for the Deaf and the Blind, which building shall be suitable as a dormitory and to contain class rooms and a hospital.

. . .

1915 Idaho Sess. Laws 245: An Act to better provide for the care and detention of feeble-minded persons.

. . .

§ 3. When any person residing in this State shall be supposed to be **feeble-minded**, and by reason of such mental condition of feeble-mindedness and of social conditions, such as want of proper supervision, control, care and support, or other causes, **it is unsafe and dangerous to the welfare of the community, for him to be at large without supervision, control and care, any relative, guardian, or conservator or any reputable citizen of the county** in which such supposed feeble-minded person resides or is found, may, by leave of court first had and obtained, file with the clerk of either circuit court, or of the county court of the county in which such supposed feeble-minded person resides or is found, or with the clerk of a city court including the municipal court of Chicago, when the supposed feeble-minded person resides or is found in the city, a petition in writing, setting forth that the person therein named is feeble-minded, the fact and circumstances of the social conditions, such as want of proper supervision, control, care and support, or other causes making it unsafe or dangerous to the welfare of the community for such person to be at large without supervision, control or care, also the name and residence, or

that such name or residence is unknown to the petitioner, of some person, if any there be, actually supervising, caring for or supporting such person, and of at least one person if any there be legally chargeable with such supervision, care or support, and also the names and residences or that same are unknown of the parents or guardians.

. . .

Parenting

IDAHO CODE § 7902 (1919): Dependent children: powers of benevolent societies.

Any benevolent or charitable society incorporated under chapter 196, all of the officers and agents of said society to be residents of the state of Idaho, and having for its object the receiving, aiding caring for placing out for adoption and consenting to adoption or improving the condition of the orphan, homeless, neglected or abused children of this state shall have authority to receive, control, train, educate, aid, care for, dispose of, place out for adoption and consent to the adoption of children under 18 years of age under the following provisions.

. . .

2. When there is in the county any child under the age of 18 years.

. . .

d. For whom the parents, because of **mental incompetency**, **physical disability**, slothfulness, drunkenness or the habitual use of narcotics or other dissipation or their immoral practices or standards are failing and will probably continue to fail to care and provide for[.]

. . .

Education

IDAHO CODE § 33-3407 (1990): Definition of deaf and blind – Examination of applicants – Admission and release of pupils.

All children between the ages of six (6) and twenty-one (21) years who are **too deaf or too blind to be educated in the public schools**, shall be deemed deaf or blind for the purposes of this chapter.

Children who are under the six (6) years, but otherwise qualified, may be admitted, when, in the discretion of the superintendent but subject to the approval of the board of trustees, they are proper subjects to receive training and education available in the school and the facilities of the school are adequate for proper care, training and education. When it has been ascertained by the superintendent that any pupil has ceased to make progress, or is no longer being benefited by attending the school, upon recommendation of the superintendent and the approval of the board trustees such pupil may be released from the school.

The board of trustees is authorized to provide for the careful examination of all applicants for admission to the school, and the expense of such examination is a lawful use of the moneys available to the board of trustees.

Sterilization

1925 Idaho Sess. Laws 358: An act to create a state board of eugenics; to provide for the sterilization of all feeble-minded, insane, epileptics, habitual criminals, moral degenerates and

sexual perverts who are a menace to society, and providing the means for ascertaining who are such persons.

Be It Enacted by the Legislature of the State of Idaho:

Section 1. How Constituted; Secretary. There is hereby established and constituted for the State of Idaho a "State Board of Eugenics". . . .

Section 2. Quarterly reports to board, by heads of institutions of departments. It shall be, and it is hereby declared, the duty of the State Public Health Adviser, the Superintendent of the Northern Idaho Sanitarium, the Superintendent of the Idaho State Sanitarium, the Superintendent of the Idaho Industrial Training School and the warden of the Idaho State Penitentiary to report quarterly, on the first of January, April, July and October, to the State Board of Eugenics, all persons, male or female, who are **feeble-minded**, **insane**, **epileptic**, habitual criminals, moral degenerates and sexual perverts, who are, or in their opinion are **like to become, a menace to society**.

Section 3. Examination of persons reported; sterilization. It shall be the duty of the State Board of Eugenics to examine into the innate traits, the mental and physical conditions, the personal records and the family traits and histories of all of the persons so reported, so far as the same can be ascertained, and for this purpose said Board shall have the power to subpoena witnesses, which subpoena shall be issued by said Board and served in like manner and with like effect as subpoenas in criminal cases in the District Court, and any member of said Board may administer an oath to any witness whom it is desired to examine in such proceeding; and if in the judgment of a majority of said proceeding; and if in the judgment of a majority of said Board **procreation by such person would produce a child or children having an inherited tendency to feeble-**

mindedness, insanity, epilepsy, criminality or degeneracy, or **who would probably become a social menace or ward of the State**, and there is no probability that the condition of such person so investigated and examined will improve to such an extent as to avoid such consequences, then it shall be the duty of such board to make an order embodying its conclusions with reference to such person in said respects and specifying such a type of sterilization as may be deemed by said Board best suited to the condition of said person and most likely to produce the beneficial results in the respects specified in this section.

. . .

Section 5. Purpose and objects to be sought. Said investigation, findings and order of said Board of shall be made with the purpose in view of securing a betterment of the physical, mental, neural or psychic condition of the person, or to **protect society from the acts of such person, or from the menace of procreation by such person**, and no in any manner as a punitive measure.

Section 6. Operations to be performed by consent of persons concerned. If any person, whose condition has been examined and reported upon by said Board, as hereinbefore provided, shall consent in writing to have the operation specified in the order of said Board performed, such operation shall thereupon be performed upon said person by or under the direction of the State Pubic Health Adviser. All such operations shall be performed with due regard for the physical condition of the person upon whom it is performed and in a safe and humane manner. In case the person to be operated upon be feeble-minded or insane, the consent hereinbefore in this section mentioned shall be construed to mean not only the written consent of the person to be operated upon but, in addition thereto, the written consent of such person's legal guardian, or if such person have no legal

guardian, then the written consent of such person's nearest known kin or personal friend within the State of Idaho.

Section 7. If consent not given, trial to be had. If any such person shall not consent, within twenty days from the service of such order upon him, to the performance of such operation, said Board of Eugenics, through its secretary or other officer having charge of its records and files, within fifteen days thereafter, or such further time as the court or judge thereof may allow, shall file a transcript of its proceedings and of its said findings, conclusions and order with reference to said person with the Clerk of the District Court of the county in which such person resides or may be found. Upon the filing of such findings, conclusions and order with the said clerk, he shall issue a summons directed to such person and deliver the same to the sheriff, together with a person and deliver the same to the sheriff, together with a copy of such order prepared and certified by him, and it shall be the duty of said sheriff to forthwith serve said summons and copy of order upon said person therein named, who shall be required, within twenty days after such service upon him, to enter his appearance in writing with the Clerk of the District Court in such case or by appearing in person before said clerk, who shall thereupon enter the appearance of such person in such proceeding. If he be an insane or feeble-minded person such appearance may be made by his guardian, if he have one; if not, then by his nearest of kin or near friend. If he be in any State Institution, facilities shall be furnished him for making such appearance.

Section 8. Court procedure. The issue thereby raised shall be whether the findings and conclusions of said Board shall be affirmed by the court, and shall be tried in the District Court of such county as a special proceeding in the same manner as a civil action at law in which the State of Idaho shall be the plaintiff and the person so summoned shall be the defendant. Each party shall have the same rights as to

production of evidence and the case shall be tried in the same manner as any other civil action. In all such cases the Prosecuting Attorney of the county where such proceedings are tried shall appear and prosecute such action on behalf of the State. If the defendant has no attorney and he is unable to secure one, the Court shall appoint an attorney from the membership of the bar of said county to conduct his defense, and appeal, if any, be taken as hereinafter provided, and such attorney shall be compensated by the State, upon order of the Court. Upon the request of either party to such proceeding all questions of fact shall be tried by a jury and the Court in every instance shall have the testimony fully reported at the expense of the State.

Section 9. Enforcement of Judgment. If the finds and conclusions of the Board of Eugenics shall be affirmed by the court, the defendant shall be immediately placed in custody by the sheriff of said county, and may be admitted to bail by the Court, who shall fix the amount of such bail, and if not so admitted to bail, shall be held until the operation provided in such findings be performed.

. . .

Voting

IDAHO CONST., art. VI, § 3 (1889):

Section 3. **No person is permitted to vote, serve as juror, or hold any civil office who is under guardianship, idiotic or insane**, or who has, at any place, been convicted of treason, felony, embezzlement of the public funds, bartering or selling or offering to barter or sell his vote, or purchasing or offering to purchase the vote of another, or other infamous crime, and how has not be restored to the rights of citizenship, or who, at the time of such election, is confined in prison on conviction of a criminal offense, or who is a

bigamist or polygamist, or is living in what is known as patriarchal, plural or celestial marriage, or in violation of any law of this State, or of the United States, forbidding any such crime; or who, any manner, teaches, advises, counsels, aids, or encourages any person to enter into bigamy, polygamy, or such patriarchal, plural, or celestial marriage, or to live in violation of any such law, or to commit any such crime; or who is a member of or contributes to the support, aid, or encouragement of any order, organization, association, corporation or society, which teaches, advises, counsels, encourages, or aids any person to enter into bigamy, polygamy or such patriarchal, or plural marriage, or which teaches or advises that the laws of this State prescribing rules of civil conduct, are not the supreme law of the State; nor shall Chinese, or persons of Mongolian descent, not born in the United States, nor Indians not taxed, who have not severed their tribal relations and adopted the habits of civilization, either vote, serve as jurors, or hold any civil office.

IDAHO CODE § 33-403A (1990): Assistance to voter.

a. If any elector is unable, due to physical disability or other handicap, to enter the polling place, **he may be handed a ballot outside the polling place** but within forty (40) feet thereof by one (1) of the election clerks, and in his presence but in a secret manner, mark and return the same to such election officer who shall proceed to deposit the ballot as provided by law.

b. If any elector, who is unable by reason of physical disability or other handicap to record his vote by personally marking his ballot and who desires to vote, then and in that case such elector shall be given assistance by the person of his choice or by one (1) of the election clerks. Such clerk or selected person shall mark the ballot in the manner directed by the elector and fold it properly and present it to the elector

before leaving the voting compartment or area provided for such purpose. The elector shall then present it to the judge of election who shall deposit the ballot as provided by law.

IDAHO CONST. art. VI, 33 (1993): Disqualification of certain persons.

No person is permitted to vote, serve as a juror, or hold any civil office who is under guardianship, or who has, at any place, been convicted of a felony, and who has not been restored to the rights of citizenship, or who, at the time of such election, is confined in prison on conviction of a criminal offense.

ILLINOIS

Employment

48 ILL. COMP. STAT. ANN. 1010/10(b) (West 1988): Regulations – Handicapped workers.

In order to prevent curtailment of opportunities for employment, avoid undue hardship, and safeguard the minimum wage rate under this Act, the Director may also issue regulations providing for the employment of **handicapped workers** at wages lower than the wage rate applicable under this Act. . . .

Institutionalization

1913 Ill. Laws 131: An act providing for the creating, locating, constructing and administering of a State colony for the care and treatment of epileptics.

Whereas, there are, in Illinois, at least 10,000 persons of all ages and conditions, suffering from epilepsy; and

Whereas, such persons are proper and fit subjects for State care and treatment; and

Whereas, **by reason of the very nature of this disease such persons are prevented from employing their time with profit, and the young epileptic is debarred from the public private schools because of such misfortune, and the epileptic at large suffers grave physical injuries; and**

Whereas, In colony life the epileptic finds safe employment, opportunity for improving his condition, mental and physical, and protection; therefore.

§ 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly: That there be and is hereby created and established a State Colony for Epileptics to be administered under the direction of the Board of Administration in accordance with the terms and provisions of an act of the General Assembly entitled, "an Act to revise the laws relating to charities," approved June 11, 1912, in force July 1, 1912. Said colony shall be known and designated as provided in said act, or by such other name and designation as 'may be given to it by said Board of Administration. The said colony shall be located upon ground to be selected by the Board of Administration. The said colony shall be located upon ground to be selected by the Board of Administration, as hereinafter provided. It shall be the duty of said board to so locate said colony that its inmates may be employed a maximum period each year in the open air.

. . .

§ 4. The object of said colony shall be to secure for *bona fide* resident epileptics of Illinois a place of employment, instruction, treatment and custody. Said colony shall be so planned, arranged and constructed that there shall be adequate segregation of the sexes, separation of children from adults, and proper classification of the inmates.

. . .

§ 6. The superintendent and members of the staff of said colony shall have the same access and enjoy the same opportunities for study, research and information at the State Psychopathic Institute as are enjoyed by the superintendent

and members of the staffs of State hospitals for insane; and it shall be the duty of the Board of Administration to make the necessary provisions for research and study in epilepsy, its causes, methods of treatment, and probable measures of prevention.

§ 7. Applicants, residents of Illinois, may be admitted to said colony by either of the following methods: 1. Upon voluntary application to the superintendent, substantiated by proof that said applicant is in need of care and treatment of said colony, such proof to consist of certificates from two physicians setting forth that said applicant for admission is an epileptic. Such certificates shall be under oath and made within thirty days next preceding the filing of such application. Physicians making such certificates shall be duly licensed to practice medicine or surgery in the State of Illinois, and shall have been in the actual practice of their profession. The application, certificate and other forms relating to the admission shall be in accordance with the rules and forms prescribed by the Board of Administration. 2. Any parent, relative, conservator, guardian, or **reputable citizen**, may file a petition in any court of record to the county where the alleged epileptic resides, setting forth that the person is suffering from epilepsy and is a proper subject for the care and custody of said colony. Such court shall make an inquiry in term time or vacation into the mental and nervous condition of such person to determine whether he is or is not an epileptic; and if it is found upon the evidence of two or more reputable physicians that such person is an epileptic, said court may order the admission of such a person, and it shall be the duty of the superintendent to receive him or her and record him or her among the inmates of said colony: *Provided*, that if such alleged epileptic is an adult his consent in writing shall be first obtained, and if a minor, or under any other disability, the consent in writing of the parent, guardian or conservator shall be first obtained: *And, provided* that in

case there is no room in said colony, the said person shall wait his or her turn. County quotas of inmates to said colony shall be based upon population to be determined by the Board of Administration.

. . .

It shall be unlawful to keep in said colony any insane person, and any such insane person who shall wrongfully obtain admission shall be returned to the county for which he or she was a Resident before admission.

1915 Ill. Laws 245: An Act to better provide for the care and detention of feeble-minded persons.

§ 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly*: The words "feeble-minded person" in this act shall be construed to mean any person **afflicted with mental defectiveness** from birth or from any early age, **so pronounced that he is incapable of managing himself and his affairs, or of being taught to do so**, and requires supervision, control and care for his own welfare, or for the welfare of others, or for the welfare of the community, who is not classifiable as an "insane person".

. . .

§ 3. When any person residing in this State shall be supposed to be **feeble-minded, and by reason of such mental condition of feeble-mindedness, and of social conditions, such as want of proper supervision, control, care and support, or other causes, it is unsafe and dangerous to the welfare of the community for him to be at large without supervision, control and care**, any relative, guardian or conservator of **any reputable citizen** of the county in which such supposed feeble-minded person resides or is found, may, by leave of court first had and obtained, file with the clerk of either the circuit court, or of

the county court of the county in which such supposed feeble-minded person resides or is found, or with the clerk of a city court, including the municipal court of Chicago, when the supposed feeble-minded person resides or is found in the city, a petition in writing, setting forth that the person therein names is feeble-minded, the fact and circumstances of the social conditions, such as want of proper supervision, control, care and support, or other causes, making it unsafe or dangerous to the welfare of the community for such person to be at large without supervision, control or care; also the name and residence, or that such name or residence is unknown to the petitioner, of some person, if any there be, actually supervising, caring for or supporting such person, and of at least one person if any there be legally chargeable with such supervision, care or support, and also the names and residences or that same are unknown of the parents or guardians.

ILL. REV. STAT § 22 (1916):

. . .

§ 4. The object of the institutions for the education of the **deaf and dumb**, and the **blind**, and of the **Asylum of Feeble-minded**, shall be to promote the intellectual, moral and physical culture of the classes of persons indicated in their titles, respectively, and to fit them, as far as possible, for earning their own livelihood and for future usefulness in society.

. . .

Marriage

89 ILL. COMP. STAT § 2 (1916):

No **insane person** or **idiot** shall be capable of contracting marriage.

Segregated Education

122 ILL. COMP. STAT. ANN. 670/10 (West 1990): Boys received – Support.

...[A]ny training school for boys in this state shall receive into such school all boys **not idiotic** and not afflicted with a contagious disease. . . .

122 ILL. COMP. STAT. ANN. 657/12 (West 1988): Imbeciles not admitted.

. . .

§ 12. **No imbecile**, or **idiot girl**, or one incapacitated for labor, nor any girl having any infectious, contagious or incurable disease, shall be committed or received into any industrial school for girls in this state.

. . .

INDIANA

Housing Discrimination

IND. CODE §16.7-5.5-3 (1990): Modification of property not required.

Section 3. Nothing in this chapter shall require any person renting, leasing or providing for compensation real property to modify his property in any way to provide a higher degree of care for a handicapped person than for one who is not handicapped.

Institutionalization

1919 Ind. Acts 480: An act to provide for the establishment and government of an Indiana farm colony for feeble-minded, making appropriation therefor, providing for the commitment and transfer of patients thereto, and their care and custody therein.

Farm Colony for Feeble-Minded

Section 1. Be it enacted by the General Assembly of the State of Indiana, That there shall be **established in this state a farm colony for the feeble-minded**. In the establishment of this institution, the general assembly recognizes the duty of the state to provide proper care for such of its citizens as are **feeble-minded**, and are therefore **unable properly to care for themselves**.

Section 11. Such **feeble-minded persons** shall be committed to said **colony for feeble-minded** by the judge of the circuit courts in the various counties and any such case shall be heard in chambers. A **reputable citizen** of the

county from which an application is to be made, shall make an application, under oath setting forth information substantially as follows: The age, sex, race, legal settlement, residence, and general mental and physical condition of the applicant, whether such applicant is under the charge of a guardian or parents, and, where known, the **cause and duration of the feeble-minded condition** and such other facts regarding the applicant's personal and family history as the board of trustees of the farm colony may require; which facts shall be submitted to the judge of the circuit court having jurisdiction over that county, together with a certificate of a reputable physician that the applicant is admissible under the rules of the board of trustees, and is free from any infectious or contagious disease and from vermin. When such statements shall have been filed, the said judge shall appoint two medical examiners who shall be physicians of not less than three (3) years' experience in the general practice of medicine and surgery, and not related to the person for whom application is made by consanguinity or marriage. It shall be the duty of said medical examiners carefully and separately to examine said person for whom application is made and separately certify in writing to said judge whether said person is a **feeble-minded person**. In this discretion the judge may call additional witnesses until fully satisfied of the condition as to **feeble-mindedness** of the person under inquiry. If it shall appear to the judge that the person is feeble-minded, he shall enter an **order of commitment** in the proper record, at the same time directing the clerk of the circuit court to forthwith apply to the superintendent of the farm colony for the admission of said person to said farm colony and to transmit with said application to said superintendent, for his information, copies of all statements and certificates submitted, certified to be under the seal of the court. Upon receiving said application and transcript of statements and certificates, said superintendent of said farm colony shall immediately determine upon the information therein contained, whether or

not the case is admissible; and if so and if there shall be room within the institution of which he is superintendent, he shall at once notify the proper clerk of the acceptance of the application for admission. Should thee be no room in the farm colony, the superintendent shall suspend the application for further consideration when vacancies do occur. No person making application or committal of a feeble-minded person under this act shall be liable for any of the costs arising therefrom.

Sterilization

IND. CODE § 22-1601 (1950):

Whenever the superintendent of any hospital or other institution of this state, or of any county in this state, which has the care or custody of **insane**, **feeble-minded** or **epileptic persons**, shall be of the opinion that it is for the best interests of the patient and of society that any inmate of the institution under his care should be **sexually sterilized**, such superintendent, if a lawfully licensed physician and surgeon, is hereby authorized to perform, or cause to be performed by some capable physician or surgeon, an operation or treatment of sterilization on any such patient confined in such institution afflicted with **hereditary forms of insanity that are recurrent, epilepsy, or incurable primary or secondary types of feeble-mindedness:** Provided, That such superintendent shall have first complied with the requirements of this act.

. . .

IOWA

Institutionalization

1876 Iowa Acts 145-48: An Act to Provide for the Organization and Support of an Asylum at Glenwood, in Mills County, for Feeble Minded Children.

. . .

Section 1. That there is hereby established at Glenwood, in Mills county, in this state, an institution to be known as the **asylum for feeble minded children**, and the property of the state of that point, including buildings and grounds heretofore used for the western branch of the Iowa soldiers' orphans' home, shall be used for that purpose.

. . .

Section 2. The purpose of this establishment are to care for, support, train and instruct **feeble minded children**.

. . .

Section 5. There shall be received into the asylum **weak minded children** between the age of seven and eighteen years.

. . .

1902 Iowa Acts 73: *Be it enacted by the General Assembly of the State of Iowa*:

Section 1. Admission. That all **feeble-minded woman** under forty-six years of age who are residents of the

state of Iowa may be admitted to the institution for feeble-minded children at Glenwood.

. . .

1909 Iowa Acts 171: An Act to provide for feeble-mined men at Glenwood and the maintenance thereof.

Section 1. Admission of Feebleminded men. That all **feebleminded men** under 46 years of age who are residents of the state of Iowa, may be admitted to the institution for **feeble-minded children** at Glenwood.

. . .

IOWA CODE § 2727-a93 (1915): Establishment-object-government.

That there is hereby established the state hospital and **colony for epileptics**. The object of the colony shall be the custody, care and treatment of epileptics and the scientific study of epilepsy.

. . .

IOWA CODE § 222-1 (1954): Feeble-minded defined.

The words "feebleminded person" in this chapter shall be construed to mean any person afflicted with **mental defectiveness** from birth or from an early age, so pronounced that he is incapable of controlling himself and his affairs and requires supervision, control, and care for his own welfare, or for the welfare of others, or for the welfare of the community, and who is not classifiable as an "insane person" within the meaning of the provisions of the chapters of this title relating to the insane.

IOWA CODE § 222-18 (1954): Guardianship or commitment.

If it be found that said person is **feeble-minded**, and that it will be conducive to the welfare of such person and to the community to place such person under guardianship, or to commit such person to some proper institution for treatment, the court or judge shall, by proper order:

1. Appoint a guardian of the person of such person, provided no such guardian has already been appointed.

2. **Commit** such person to any **state institution for the feeble-minded**.

3. Commit such person to a private institution of this state, duly incorporated for the care of such persons, and approved by the board of control, provided such institution is willing to receive such person.

IOWA CODE § 223.1 (1954): Objects.

The hospital for **epileptics** and schools for **feeble-minded**, hereinafter in this chapter referred to as "hospital", shall be maintained for the purpose of securing humane, curative, and scientific care and treatment of epileptics, and for the training, instruction, care, and support for **feeble-minded residents** of this state.

IOWA CODE ANN. § 670.2 (1990): Petition – appointment.

When a petition, verified by affidavit, is presented to the district court that any inhabitant of the county is:

1. A **mental retardate**, **lunatic**, or person of **unsound mind**;

2. . . . and the allegations of the petition are satisfactorily proved upon the trial, the court may appoint a guardian of the property of such person.

Marriage

IOWA CODE ANN. § 595.3 (West 1988): License.

Previous to the solemnization of any marriage, a license for that purpose must be obtained from the clerk of the district court. Such license must not be granted in any case:

. . .

5. Where either party is **mentally ill** or **retarded,** a **mental retardate**, or under guardianship as an **incompetent**.

Segregated Education

IOWA CODE ANN. § 299.18 (West 1988): Education--state school.

Children over seven and under nineteen years of age who are so **deaf** or **blind** or severely **handicapped** as to be **unable to obtain an education in the common schools** shall be sent to the proper state school therefore, unless exempted, and any person having such a child under the person's control or custody shall see that such child attends such school during the scholastic year.

Sterilization

IOWA CODE § 145 (1954): State Board.

A state board of eugenics is hereby created . . . .

IOWA CODE § 145.2 (1954): Quarterly reports of defective.

Each member of said board, and the warden of the penitentiary and the warden of the men's reformatory, shall, annually, on the first day of January, April, July and October, report to the state board of eugenics the names of all persons, male or female, living in this state, of whom he or she may have knowledge, who are **feeble-minded**, **insane**, syphilitic, habitual criminals, moral degenerates, or sexual perverts and who are **menace to society**.

IOWA CODE § 145.9 (1954): Order for sterilization.

If in the judgment of a majority of said board **procreation by such persons would produce a child or children having an inherited tendency to feeble-mindedness, syphilis, insanity, epilepsy,** criminality, or degeneracy, or who would probably become a social menace or ward of the state, and there is no probability that the condition of such person so investigated and examined will improve to such an extent as to avoid such consequences, then it shall be the duty of such board to make an order embodying its conclusions with reference to such person in said respects and specifying such a type of **sterilization** as may be deemed by said board best suited to the condition of said person and most likely to produce the beneficial result sin the respects specified in this section, be nothing contained in this chapter shall be construed to authorize castration or removal of sound organs from the body.

1911 Iowa Acts 144-45: An act to prevent the procreation of habitual criminals, idiots, feeble-minded and imbeciles.

Section 1. Unsexing of criminals, idiots, etc.

That is shall be the duty of managing officer of each public institution in the state, intrusted with the custody or care of criminals, **idiots**, **feeble-minded**, **imbeciles**, drunkards, drug-fiends, epileptics and syphilitics, and they

are hereby authorized and directed to annually, or oftener, examine into the mental or physical condition of the inmates of such institutions, with a view of determining **whether it is improper or inadvisable to allow any of such inmates to procreate**; and to annually, or oftener, call into consultation the members of the state board of parole. The member of such board and the managing officer and the surgical superintendent of such institution shall judge of such matters. If a majority of them decide that **procreation by any such inmate would produce children with a tendency to disease, crime, insanity, feeble-mindedness, idiocy or imbecility**, and there is no probability that the condition of any such inmate so examined will improve to such an extent as to render procreation by any such inmate advisable, or if the physical or mental condition of any such inmate will be materially improved thereby, or if such inmate is an epileptic or syphilitic, or gives continued evidence while an inmate of such institution that he or she is a moral or sexual pervert, then the surgeon of the institution shall perform the operation of **vasectomy** or **litigation of the fallopian tubes**, as the case may be, upon such person.

. . .

Voting

IOWA CONST. art. II, § 5 (1906): Right of suffrage.

Section 5. No **idiot** or **insane person**, or person convicted of any infamous crime, shall be entitled to the privileges of an elector.

IOWA CONST. art. II, § 5 (1989): Disqualified persons.

No **idiot**, or **insane person**, or person convicted of any infamous crime, shall be entitled to the privileges of an elector.

KANSAS

Institutionalization

1881 Kan. Sess. Laws 74: An Act to establish an asylum for the education of the feeble-minded and imbecile youth, and making an appropriation for the maintenance of the same.

Be it enacted by the Legislature of the State of Kansas:

Section 1. That there shall be established and organized, as soon as practicable, and within six months from the passage of this act, **an institution for the education of idiotic and imbecile children, to be denominated the Kansas state asylum for idiotic youth**.

. . .

Section 6. As soon as suitable accommodations are made, as provided in section three of this act, the trustees shall admit into said asylum all **idiotic** and **imbecile** youths who have been residents of the state of Kansas six months, and are not over fifteen years of age, and who are **incapable of receiving instruction in the common schools**.

. . .

Marriage

KAN. STAT. ANN. § 6155 (1915): **Marriage of person who is epileptic, imbecile, feeble-minded or afflicted with insanity unlawful, except female person over forty-five years; marriage of children of insane parents.** No woman under the age of forty-five years, or man of any age, except he marry a woman over the age of

forty-five years, either of whom is epileptic, imbecile, feeble-minded or afflicted with insanity, shall hereafter intermarry or marry any other person within this state. **It shall be unlawful for any person to marry any such feeble-minded, imbecile or epileptic person, or any one afflicted with insanity. Children born after a parent was insane shall not marry except under the above-named conditions, unless the parent or parents of such children shall have been discharged from the state hospital for insane more than nine months before the birth of the child as cured and remained cured for a period of twenty years after such discharge.**

Segregated Education

KAN. STAT. ANN. § 72-853 (1990): Program for education of **deaf-blind** or otherwise severely handicapped children by state department; expenditures; definitions.

The state department of public instruction is hereby authorized to expend available funds for the purpose of sending children who are **deaf-blind**, or otherwise severely handicapped to any facility, school, or institution, within or without the state of Kansas, providing a qualified program of education for such children. Such funds may be spent for evaluation and diagnosis, room, board, tuition, transportation, and other items which are necessarily relevant to the education of such children. In interpreting and carrying out the provisions of this act, the words "**deaf-blind** children" whenever used, will be construed to include any child of educable mind whose combinations of handicaps of **deafness** and **blindness** prevents him from profiting satisfactorily from educational programs provided for the **blind** child or the **deaf** child; and the words "otherwise severely handicapped children," wherever used, will be construed to include any child of educable mind whose handicap or combination of

handicaps prevents him from profiting satisfactorily from educational programs provided through a sponsoring public school district in this state.

Sterilization

1913 Kan. Sess. Laws 525: An Act to prevent the procreation of habitual criminals, idiots, epileptics, imbeciles, and insane, and providing a penalty for the violation thereof.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. That is shall be the **duty** of the managing officers of all state institutions of this state entrusted with the care or custody of habitual criminals, **idiots**, **epileptics**, **imbeciles**, and **insane** and they are hereby **authorized and directed** to obtain the advice and professional services of competent surgical assistants, who, jointly with the physician or surgeon in charge of the institution in which any of such inmates shall be, shall constitute the authority whose duty it shall be to examine such inmate or inmates of the several institutions as are deemed to be **improper and inadvisable to allow to procreate**. Such authority shall examine the physical and mental condition of such inmate or inmates, the history thereof so far as can be ascertained, and **if, in the judgment of such authority, procreation by any such inmate or inmates would produce children with an inherited tendency to crime, insanity, feeble-mindedness, epilepsy, idiocy, or imbecility, and there is no probability that the condition of any such inmate or inmates so examined will improve to such an extent as to render procreation by any such inmate or inmates advisable, or if the physical or mental condition of any such persons will be materially improved thereby**, then said authority shall report their conclusions with a recommendation to the district court or any court of competent jurisdiction in and for the district from which such inmate or inmates has been

committed to such institution or institutions. The court shall thereupon hear and determine the matter and if satisfied that the subject is an habitual criminal within the meaning of this act, or is **insane**, an **idiot**, **imbecile**, or an **epileptic**, and that the purposes of this act will be accomplished by such order shall adjudge that such operation shall be performed and shall appoint one of the authority signing such report to perform the operation of vasectomy or oöphorectomy, as the case may be, upon such person.

. . .

SECTION. 3. **Any managing officers herein charged with any duty specified in section 1, who shall fail, neglect or refuse for sixty days or more in the performance thereof, shall be guilty of a misdemeanor and subject to a fine of not more than $100,000 or imprisonment in the county jail for not more than thirty days, or both such fine and imprisonment.**

KAN. STAT. ANN. § 76-149 (1949): **Sterilization of inmates of institutions.**

That the warden of the state penitentiary, the superintendent of the Hutchinson reformatory, the superintendent of each of the state hospitals for the insane, the state hospital for epileptics, the state home for feeble-minded, or the state industrial school for girls, shall certify in writing to the governing board of the institution of which he or she is warden or superintendent, **that he or she believes that the mental or physical condition of any inmate would be improved thereby or that procreation by such inmate would be likely to result in defective or feeble-minded children with criminal tendencies, and that the condition of such inmate is not likely to improve so as to make procreation by such person desirable or beneficial to the state, it shall be lawful to perform a surgical operation for**

the sterilization of such inmate as hereafter provided, and shall not render the board of examiners, its members or any person participating in the operation liable either civilly or criminally.

. . .

Travel

KAN. STAT. ANN. § 38-315 (1990): Unlawful placing or receiving of child from another state; penalty.

No association which is incorporated under the laws of any other state than the state of Kansas shall place any child in any family home within the boundaries of the state of Kansas, either with or without indenture or for adoption, unless the said association shall have furnished the board of administration with such guaranty as they may require that **no child will be brought into the state of Kansas by such society or its agents having any contagious or incurable disease, or having any deformity, or being of feeble mind or vicious character**, and that said association will receive and remove from the state any child brought into the state of Kansas by its agent which shall become a public charge within the period of five years after being brought into the state. Any person who shall receive to be placed in a home, of shall place in a home, any child in behalf of any association incorporated in any other state than the state of Kansas which shall not have complied with the requirements of this act shall be imprisoned in the county jail not more than thirty days, or fined not less than five dollars or more than one hundred dollars, or both, in the discretion of the court.

KAN. STAT. ANN. § 39-111 (1990): State legal residence requirements; waiver, when.

No person shall be admitted to a state hospital, a state hospital and training center, Kansas neurological institute, an institution for the education of the **deaf**, an institution for the education of the **blind**, or to a state hospital or sanatorium for tuberculosis, who has not lived in the state of Kansas at least one year continuously immediately prior to application for admission thereto.

. . .

Voting

KAN. CONST. art. V (1859):

Section 1. Every white male person of twenty-one years and upwards, belonging to either of the following classes – who shall have resided in Kansas six months next preceding any election, and in the township or ward in which he offers to vote at least thirty days next preceding such election – shall be deemed a qualified elector.

. . .

Section 2. **No person under guardianship, *non compos mentis*, or insane**; . . . **shall be qualified to vote or hold office in this state**, until such disability shall be removed by a law passed by a vote of two-thirds of all the members of both branches of the legislature.

. . .

KAN. CONST. art. V (1859): Disqualification to vote.

The legislature may, by law, exclude persons from voting because of mental illness or commitment to a jail or penal institution. No person convicted of a felony under the

laws of any state or of the United States, unless pardoned or restored to his civil rights, shall be qualified to vote.

KENTUCKY

Employment

KY. REV. STAT. ANN. § 207.140 (Michie 1990): Preemployment inquiry – Basis for rejection of applicant for employment or housing.

. . .

(2) Nothing contained in KRS 207.130 to 217.40 shall be construed to prohibit the rejection of an applicant for employment or housing on the basis of:

. . .

(b) Any handicap which is not demonstrable by medically accepted clinical or laboratory diagnostic techniques, including, but not limited to, alcoholism, drug addiction, and obesity. . . .

Institutionalization

1918 Ky. Acts 156: An Act provide for the commitment, care, treatment, training, **segregation** and custody of feeble-minded, epileptic and insane persons.

. . .

Section 2. Home and Farm Colony for Feeble-Minded. There shall also be established and maintained a **farm colony for the feeble-minded and epileptic persons** . . . equipped with dormitories and other buildings sufficient to accommodate at least five hundred **inmates** . . . .

Managing Own Affairs

KY. REV. STAT. ANN. § 67.592 (Michie 1985): Seized and forfeited property.

(1) The county judge/executive shall designate the sheriff of the county, or, if there is a county police department, may designate the chief of the county police, as custodian of all property:

. . .

(f) Which is taken from person **supposed to be insane**, intoxicated, or **otherwise incapable of taking care of themselves**.

KY. REV. STAT. ANN. § 95.435 (Michie 1985): Custody and disposition of property taken by the police department.

(1) The police department in cities of the second class, and urban-county government shall take charge of property, . . . taken from persons **supposed to be insane**, intoxicated or **otherwise incapable of taking care of themselves**.

Voting

KY. CONST. § 145 (1980): The following persons are excepted and shall not have the right to vote:

. . .

Third: **Idiots and insane persons**.

KY. CONST. § 145 (1990): Persons entitled to vote.

Every citizen of the United Sates of the age of eighteen years who has resided in the state one year, and in the county six months, and the precinct in which he offers to vote sixty days next preceding the election, shall be a voter in said precinct and not elsewhere but the following persons are excepted and shall not have the right to vote.

. . .

3. **Idiots** and **insane persons**.

LOUISIANA

Institutionalization

1918 La. Acts 240:

Section 1. Be it enacted by the General Assembly of the State of Louisiana that there is hereby created and established a charitable institution for the State of Louisiana to be known as the "State Colony and Training School", which is an institution especially provided for the **feeble-minded persons** of the State of Louisiana.

Section 2. Be it further enacted, etc., that the words "feeble-minded" in this Act shall be construed to mean any person afflicted with **mental defectiveness** from birth or from an early age, so pronounced that he is incapable of managing himself and his affairs, or being taught to do so, and requires supervision, control and care for his own welfare, or for the welfare of others, or for the welfare of the community, who is not classifiable as an insane person within the meaning and intent of the laws of the State of Louisiana.

LA. REV. STAT. ANN. § 581 (West 1990):

Upon written authorization of the deputy secretary, any employee or agent of the [Bureau of Criminal Identification and Information] may enter any institution to which persons have been committed, who have been convicted of crime, or declared to be criminal **insane** or to be **feeble-minded** delinquents, to take or cause to be taken fingerprints or photographs or to make investigations relative to any person confined therein, for the purpose of obtaining information which will lead to the identification of criminals.

Managing Own Affairs

LA. REV. STAT. ANN. § 1591 (West 1990): Persons incapable of being witnesses to testament.

The following persons are absolutely incapable of being witnesses to testaments:

1. Children who have not obtained the age of sixteen years complete.

2. Persons who are **insane**.

3. Persons who are **deaf**. However, one who is **deaf** may be a witness to a testament authorized by R.S. 9:242 and R.S. 9:2444.

4. Persons who are **blind**.

5 Persons whom the criminal laws declare incapable of exercising civil functions.

Travel

1869 La. Acts 657-59: An act to reorganize the bureau of emigration and for measures to develop the resources and increase the population and wealth of the State of Louisiana.

. . .

Section 2. *Be it further enacted, etc.,* that within twenty four hours after the landing of any passenger or passengers from any ship or vessel arriving at the port of New Orleans from any of the United States other than this State, or from any country out of the United States, the master or commander of the ship or vessel from which such passenger or passengers shall have been landed, shall make a

report in writing, on oath or affirmation, to the "commissioners of emigration," or to such person as they may designate and appoint as their agent, which report shall state the name, place of birth, last legal residence, age, and occupation of every person or passenger who shall have been landed from such ship or vessel on her last voyage to said port not being a citizen of the United States, and who shall have within the last twelve months arrived from any country out of the United States at any place within the United States, and who shall not have paid the communication money or been bonded according to the provisions of the act; ... The said report shall further specify whether any of said passengers or reported are **lunatic, idiot, deaf, dumb, blind, infirm, maimed**, or above the age of sixty years, also designating all such passengers as shall be under the age of thirteen, or widows having families, or woman without husbands having families, with the names and ages of their families, and shall further specify particularly the names, last place of residence, and ages of all passengers who may have died during the last said voyage of such vessel, also the names and residences of the owner or owners of such vessel.

...

Section 3. *Be it further enacted, etc.,* that it shall be the duty of the said commissioners of emigration or their appointed agent, by an endorsement to be made on said report, to **require the owner or consignee of the ship or vessel from which such persons were landed to give a several bond to the people of the State** that it shall be the duty of the said commissioners of emigration or their appointed agent, by an endorsement to be made on said report, to require the owner or consignee of the ship or vessel from which such persons were landed to give a several bond to the people of the State in a penalty of three hundred dollars for each and every person or passenger included in said report, such bond being secured as hereinafter provided and

conditioned to indemnify and save harmless the commissioners of emigration and each and every city, town, and parish in this State from any costs which said commissioners or such city, town, or parish shall incur for the relief or support of the person named in the bond within five years from the date of such bonds, and also to indemnify and refund to the said commissioners of emigration any expense or charge they may necessarily incur for the support or medical care of the persons named therein. . . .

Voting

LA. CONST. art. 202 (1913):

The following persons shall not be permitted to register, vote or hold any office or appointment of honor, trust or profit in this State, to-wit: Those who have been convicted of any crime punishable by imprisonment in the penitentiary, and most afterwards pardoned with express restoration of franchise; those who are **inmates of any charitable institution**, except the Soldiers' Home; those actually confined in any public prison; all interdicted persons, and all persons **notoriously insane** or **idiotic**, whether interdicted or not.

LA. CONST. art. I, § 10 (2000): Right to Vote; Disqualification From Seeking or Holding an Elective Office.

(A) **Right to Vote**. Every citizen of the state, upon reaching eighteen years of age, shall have the right to register and vote, except that this right may be suspended while a person is interdicted and judicially declared **mentally incompetent** or is under an order of imprisonment for conviction of a felony.

. . .

MAINE

Employment

ME. REV. STAT. ANN. tit. 26, § 666 (West 1988): Handicapped workers.

For any employment in which the minimum wage is applicable, the director may issue to any person **physically handicapped by age, or otherwise**, a special certificate authorizing the employment of such person for a period not to exceed one year at a wage less than the minimum wage established by this subchapter. The director may hold such hearings and conduct such investigations as he shall deem necessary for the purpose of fixing the special minimum wage for the licensee. Such license may be renewed from time to time by the director.

ME. REV. STAT. ANN. tit. 5, § 4573 (West 1990): Not unlawful employment discrimination.

It shall not be unlawful employment discrimination:

. . .

4. Refuse to hire or discharge physically or mentally handicapped. Nothing in this Act shall prohibit an employer from refusing to hire or discharging a physically or mentally handicapped employee, or subject an employer to any legal liability resulting from the refusing to employ or the discharge of a physically or mentally handicapped employee, duties or perform those duties in a manner which would not endanger the health or safety of the employee or the health or safety of other to be at, remain or go to employment are to be performed.

Institutionalization

1921 Me. Acts. ch. 60 § 47: Age limits not to apply to patients transferred from state hospitals for the insane.

The hospital trustees shall have the general management and supervision of the Maine School for Feeble-Minded, established at Pownal, in the county of Cumerland, for the care and education of **idiotic and feeble-minded males**, between the ages of six years and forty-five years, except that idiotic and feeble-minded state paupers of either sex or patients transferred from either state hospital for the insane under the provision of section six of this chapter may be admitted after the above stated ages. The trustees may make all necessary rules and regulations as to admission to said institution and for the government and control of said institution and its inmates, and do everything necessary to properly care for and educate the feeble-minded of the state. One or more of said trustees shall visit said school as often as once each month, and the board of trustees shall annually on or before the first day of October of each year furnish a report to the governor and council, containing a history of the school for the year and a complete statement of all accounts, and of all funds, general and special, appropriated or belonging to said school, with a detailed statement of disbursements.

Marriage

Marriage and its solemnization. Registration of vital statistics. Parents and children. Abused and neglected children.

. . .

Sec. 2. No **insane person** or **idiot** is capable of contracting marriage.

. . .

Sterilization

1925 Me. Acts 198 ch. 208: An Act permitting Sterilization Operations in Certain Cases of Mental Disease and Feeble-Mindedness.

Be it enacted by the People of the State of Maine, as follows:

Sec. 1. **Operations of vasectomy and fallectomy may be performed under certain conditions.** That the operations of vasectomy and fallectomy may be performed under the conditions and within the restrictions herein described, and under such provisions shall be lawful.

Sec. 2. **Operations may be performed to prevent reproduction of feeble-mindedness or in treatment of mental disease; consent must be obtained; procedure prior to operation.** When either of the recognized sterilizing operations herein referred to may be indicated for the **prevention of the reproduction of further feeble-mindedness**, or for the therapeutic treatment of certain forms of mental disease, physicians having the custody of such cases may recommend to the nearest relative, guardian and affected individual the advisability and necessity of such operation; and when the written consent of the patient, when mentally competent to give such consent, as well as that of the nearest relative or guardian is given, the physician having the custody aforesaid of said case shall call a counsel of two registered medical practitioners – one a physician and one a surgeon – of not less than five years' practice and not related to the patient, whose duty it shall be in conjunction with the physician in charge of the case, to examine the individual

recommended for operation. Whether the person to be operated upon is mentally capable of giving his consent shall be decided by the consultants and stated in writing, with their reasons therefor, and such written statement shall be dept on file at school for feeble-minded and in case they find that the patient is mentally incapable of giving his consent, the consent of the guardian or nearest relative must be secured. If in the judgment of the consulting physicians the operation will prevent the further propagation of mental deficiency, or if in the judgment of the medical consultants the physical or mental condition of any such person will be substantially benefited thereby, then the consultants shall select a competent surgeon to perform the operation of fallectomy or vasectomy, as the case may be, upon such person.

Voting

ME. CONST. art. II, § 2 (1918):

Every male citizen of the United States of the age of twenty-one years and upwards, **excepting** paupers, **persons under guardianship,** and Indians not taxed, having his residence established in this State for the term of three months next preceding any election, shall be an elector for Governor, Senators and Representatives, in the town or plantation where his residence is so established; and the elections shall be by written ballot. . . .

ME. CONST. art. II, § 1 (1999): Qualifications of electors; written ballot; military servicemen; students; Indians

Every citizen of the United States of the age of 18 years and upwards, **excepting persons under guardianship for reasons of mental illness**, having his or her residence established in this State, shall be an elector for Governor, Senators and Representatives, in the city, town or plantation where his or her residence has been established, if he or she

continues to reside in this State; and the elections shall be by written ballot. . . .

ME. REV. STAT. ANN. tit. 21-A, 3630 (West 1999): Alternative accessible voting places for the physically handicapped.

. . .

2. Voting places. Before July 1, 1985, each municipality shall provide at least **one** voting place which is in a building which is accessible.

. . .

A. **The Secretary of State shall grant a waiver from the requirements of this subsection to any municipality which satisfactorily demonstrates that those requirements ought not to apply or would create an extreme hardship.**

B. **In municipalities in which one or more voting places are inaccessible to handicapped voters and in which the office of the clerk is in a building which is accessible as defined in subsection 1, paragraph A, the municipal officers shall designate the office of the clerk as an alternative voting place for physically handicapped voters who reside in voting districts which do not have accessible voting places. In municipalities in which one or more voting places and the office of the clerk are inaccessible to physically handicapped voters and in which one or more voting place is accessible to these voters, the municipal officers shall designate one of these accessible voting places, as centrally located as possible, as the alternative voting place for physically handicapped voters who reside in voting districts which do not have accessible voting places.** A physically handicapped voter who wishes to vote at an alternative voting place must notify

the clerk of the municipality at least 48 hours before the date of any election. This notice may be waived if an emergency exists. The clerk shall keep a list of the persons who give this notice. . . .

MARYLAND

Employment

MD. CODE ANN. § 8 (1986): Application of blind person to operate a business.

Any **blind** person of the age of 18 years or more, desiring to operate a legitimate business of any kind to provide a livelihood for himself and dependents, if any, may apply to **Blind** Industries and Services of Maryland.

Institutionalization

1904 Md. Laws, art. 59, § 1: **Lunatic or Insane Paupers.**

When any person is alleged to be a lunatic or insane and without sufficient means to pay for his or her maintenance at any asylum, and who has no relative or relatives or others legally chargeable with his or her support, the county commissioners of the county in which such person may reside, or the supervisors of city charities of the department of charities and corrections of the city of Baltimore (if such person resides in the city of Baltimore), shall, upon the written certificates of two qualified physicians made in accordance with the provisions of section 31, **cause such person to be sent to the almshouse of the county or city to which he or she belongs, or to a hospital or some other place better suited to his or her condition**, there to be confined at the expense of the county or city until he or she shall have recovered and be discharged in due course of law; but if demanded by the alleged lunatic or insane person or any of his or her relatives or friends, or if requested by the board of county commissioners of the county in which the alleged lunatic or insane person resides, or by the supervisors of the city charities of the department of charities and

corrections of the city of Baltimore, if said person resides therein, the circuit court for the county in which such person may reside, or the criminal court of Baltimore, (if such person resides in the city of Baltimore) shall cause a jury of twelve good and lawful men to be empanelled forthwith and shall charge the said jury to inquire whether such person is insane or lunatic, and if found so it shall be the duty of the county commissioners or the supervisors of city charities of the department of charities and corrections of Baltimore city to cause such person to be sent to the almshouse of the county or city to which he or she belongs, or to a hospital, or to some other place better suited to his or her condition, there to be confined at the expense of the county or city, until he or she shall have recovered and be discharged in due course of law. It shall be the duty of any board of county commissioners or the supervisors of the city charities of the department of charities and corrections of the city of Baltimore, before whom any such alleged lunatic or insane person is brought for commitment under this section, if not satisfied that such person is lunatic or insane, as defined in section 3, to notify the state attorney of said county or city, and he shall immediately thereupon bring the said question before the circuit court for the said county or the criminal court of Baltimore for determination in accordance with the provisions of this section. Nothing contained in this section shall prevent the friends or relatives of such lunatic or insane person from confining him or her or providing for his or her comfort.

1906 Md. Laws 268: AN ACT to repeal and re-enact with amendments Section 4 of Chapter 562 of the Acts of 1894 . . . so as to further provide for the admission, custody and discharge of **idiotic, imbecile** and **feeble-minded persons.**

. . .

Section 4. *And be it enacted*, That said Maryland Asylum and Training School for Feeble-Minded shall receive, care for and educate, free of charge, all **idiotic, imbecile and feeble-minded persons** of this State whom the board of visitors shall consider proper subjects to receive the benefit of said asylum and training school, who shall present a certificate of the Orphans' Court or County Commissioners of the city or county in which such persons respectively reside, and they, their parents or guardians are unable to pay for their maintenance and education in whole or in part; and in case such persons, or any of them, their parents or guardians, are able to pay for such maintenance and education in part, then said visitors shall be at liberty to charge so much as they shall find such persons, their parents or guardians are severally able to pay towards such maintenance and education; but where such persons, their parents or guardians, are able to pay in full, the said visitors are permitted to charge such reasonable amount as will cover the expense for the maintenance and education of each person so able to pay; and said visitors shall also be authorized to receive **feeble-minded children** from other states and the District of Columbia, when there is ample room in said institution for the same, upon such terms and conditions as the board of visitors shall approve; and all moneys so received for board and tuition shall be applied in the maintenance of said institution; and all such **idiotic, imbecile** or **feeble-minded persons** who have been, or who shall hereafter be received into said institution free of charge, upon the presentation of a certificate of the Orphans' Court or County Commissioners shall be taken and regarded as wards of the State of Maryland, and all such persons shall remain in the care, custody and control of the visitors of said institution, and the visitors of said institution are hereby authorized to retain all such persons in their care, custody and control at said institution, until such time as in the judgment of said visitors, or a majority of them, the welfare of such persons and the public interest shall justify or call for

their release or discharge therefrom, unless otherwise discharged by due process of law.

Voting

MD. CONST. art. I, § 35 (1909): That no person above the age of twenty-one years, convicted of larceny or other infamous crime, unless he shall be pardoned by the executive, shall ever thereafter be entitled to vote at any election in this State, and no person under guardianship as a lunatic, or as a person ***non compos mentis***, shall be entitled to vote.

MD. CONST. art. I, § 34 (1981): Right to vote of persons convicted of certain crimes and persons under guardianship.

The General Assembly by law may regulate or prohibit the right to vote of a person convicted of infamous or other serious crime or **under care or guardianship for mental disability**.

MD. CODE ANN. (ELEC.) § 3.21A (1988): Alternate polling place for elderly or handicapped voter.

(a) (1) Upon the request of an **elderly** or **handicapped** voter whose polling place is not structurally barrier free the board shall either:

(i) Assign the voter to an election district, ward, or precinct whose polling place is structurally barrier free; or

(ii) Notwithstanding other provisions of law regarding eligibility for an absentee ballot, issue the voter an absentee ballot in accordance with the procedures established under this article.

(2) In order to qualify for assignment to an alternate polling place, the voter shall apply for a change in polling place on a form prescribed by the State Administrative Board of Election Laws no later than the closing of registration for any election.

(3) An **elderly** or **handicapped** voter who is assigned to another polling place under this subsection shall be provided with the same ballot as that used at the voter's original polling place.

(b) The alternate polling place shall be located in the same county or Baltimore City as the polling place where the voter resides and must be one in which the ballot used is identical to the ballot in the polling place where the voter resides.

(c) This section **applies only if a structurally barrier free alternate polling place meeting the provisions of subsection (b) is available**.

MASSACHUSETTS

Institutionalization

MASS. GEN. LAWS ch. 120, § 14 (1987): Applications for new commitments for insane, feeble minded and sexually psychopathic persons.

Whenever the department finds that any person committed to it is **insane** or **feeble minded**, within the meaning of chapter one hundred and twenty-three, or a sexual psychopath, within the meaning of chapter one hundred and twenty-three A, **or a potential psychotic**, as defined and determined by the assistant commissioner of the bureau of clinical services, the department may make application to the proper court for a new commitment to the appropriate agency in accordance with law.

Managing Own Affairs/ Parenting

MASS. GEN. LAWS ch. 272, § 5 (1987): Sexual intercourse with feeble minded persons.

Whoever has unlawful sexual intercourse with a person who is **feeble minded, an idiot or imbecile or insane,** under circumstances which do not constitute rape, shall, if such person had reasonable cause to believe that such other person was **feeble minded**, an **idiot** or **imbecile** or **insane**, be punished as provided in section three.

MASS. GEN. LAWS ch. 123, § 2b (1987): Appointment of guardian or conservator.

In addition to the periodic review under section fourteen of this chapter, whenever the superintendent has

reason to believe that a person who has been under the care of the department as an impatient or resident for more than six months, who is not under guardianship or conservatorship, is unable to care for his property, he shall promptly notify said person's nearest living relative and recommend that the necessary steps be taken for the appointment of a guardian or a conservator.

Travel

1852 Mass. Acts 195, ch. 279: AN ACT Concerning alien passengers.

Section 1. The fifth section of the act entitled "An act concerning alien passengers," approved on the 10th day of May, in the year 1848, is hereby amended so as to read as follows:

If on examination there shall be found among said passengers any **lunatic**, **idiotic**, **deaf and dumb**, **blind**, or **maimed** person, **no such person shall be permitted to land** until the master, owner, consignee, or agent of such vessel shall make and deliver to said superintendent a bond to the Commonwealth, with satisfactory sureties, in the sum of one thousand dollars, conditional that such passenger shall not, within ten years from the date of said bond, become a city, town, or state charge within this Commonwealth. And in respect to every other of said passengers the said superintendent, before he shall be permitted to land, shall require a bond, secured as aforesaid, in the sum of three hundred dollars, conditioned that such person shall not become a charge as aforesaid within five years from the date of said bond: *Provided, however,* That in lieu of the bond lastly above mentioned the said superintendent may receive from said master, owner, consignee, or agent, such sum as in his judgment shall be sufficient to cover the risk incurred by

the Commonwealth in permitting such passenger to be landed, and thereupon permit such passenger to be landed: *Provided*, That the sum so to be paid shall in no case be less than two dollars; and the names of all such passengers shall be certified by said superintendent on the back of the report: *And provided further,* That if any passengers so arriving as aforesaid are so sick or destitute as to require relief, and if said master shall refuse to report them, or if said master, owner, consignee, or agent shall refuse to report them, or if said master, owner, consignee, or agent shall refuse to give such bond as is herein required, the said superintendent may permit them to be landed, and in such cases any city or town that shall be put to any expense for the support, sickness, or burial of any such passenger, within ten years of the time he has so landed, may maintain an action of debt against said master, owner, consignee, or agent, and recover all expenses incurred as aforesaid; and said commanding officer, owner, consignee, or agent shall be liable to the penalties provided in the tenth section of this act.

Voting

MASS. CONST. art. III (1822):

Every male citizen of twenty-one years of age and upwards (except paupers and **persons under guardianship**), who shall have resided within the commonwealth one year, and within the town or district in which he may claim a right to vote six calendar months next preceding any election of governor, lieutenant-governor, senators, or representatives, and who shall have paid, by himself or his parent, master, or guardian, any State or county tax which shall, within two years next preceding such election, have been assessed upon him in any town or district of this commonwealth, and also every citizen who shall be by law exempted from taxation, and who shall be in all other respects qualified as above

mentioned, shall have a right to vote in such election of governor, lieutenant-governor, senators, and representatives, and no other person shall be entitled to vote in such elections.

MICHIGAN

Employment

MICH. COMP. LAWS § 338.1719 (1983): Refusal to issue or suspension or revocation of license; grounds. [polygraph license].

. . .

Section 19. The board may refuse to issue a license, or may suspend or revoke a license on one or more of the following grounds, if the holder or applicant for a license has:

. . .

(h) Been adjudged mentally ill, mentally deficient, or in need of mental treatment.

MICH. COMP. LAWS § 449.32 (1990): Dissolution by decree of court.

(1) On application by or for a partner the court shall decree a dissolution whenever:

(a) A partner has been declared **a lunatic** in any judicial proceeding or is shown to be of **unsound mind**.

MICH. COMP. LAWS § 393.361 (1990): Qualifications of applicant to operate concession; limitation on operation.

. . .

Section 11. The qualifications of an applicant to operate a concession shall be determined according to

qualifications established by the commission. A **blind person** shall not operate more than 1 concession.

Housing Discrimination

MICH. COMP. LAWS § 5.2961 (16a) (1999): State licensed residential facility defined; consideration as residential use for zoning purposes; inapplicability to certain facilities; commission consideration of board's recommendations; final approval of programs; previously licensed or approved facilities; public hearing; decisions, conditions.

Sec. 16a. (1) As used in this section, "state licensed residential facility" means a structure constructed for residential purposes that is licensed by the state pursuant to Act No. 287 of the Public Acts of 1972, as amended, being sections 331.681 to 331.694 of the Michigan Compiled Laws, or Act No. 116 of the Public Acts of 1973, as amended, being sections 722.111 to 722.128 of the Michigan Compiled Laws, which provides resident services for 6 or less persons under 24-hour supervision or care for persons in need of that supervision or care.

. . .

(4) At least 45 days before licensing a residential facility described in subsection (1), the state licensing agency shall notify the county board of commissioners or its designated agency of the county where the proposed facility is to be located to review the number of existing or proposed similar state licensed residential facilities whose property lines are within a 1,500 foot radius of the property lines of the location of the applicant. The county board of commissioners of a county or an agency of the county to which the authority is delegated may, when a proposed facility is to be located within the county, give appropriate **notification** of the proposal to license the facility **to those**

residents whose property lines are within a 1,500 foot radius of the property lines of the proposed facility. A state licensing agency shall not license a proposed residential facility when another state licensed residential facility exists within the 1,500 foot radius, unless permitted by local zoning ordinances, of the proposed location **or when the issuance of the license would substantially contribute to an excessive concentration of state licensed residential facilities within the county**. This subsection shall not apply to state licensed residential facilities caring for 4 or less minors.

. . .

Institutionalization

1893 Mich. Pub. Acts 412: AN ACT to establish a home and training school for the **feeble-minded** and **epileptic**, and making an appropriation for the same.

Section 1. *The People of the State of Michigan enact*, that there shall be established in this State an institution for the custody, care, education, proper treatment and discipline of **feeble-minded and epileptic persons**, under the name and the style of **the "Michigan Home for the Feeble-minded and Epileptic**.

. . .

Section 20. All **feeble-minded** and **epileptic** persons between the ages of six and twenty-one years who are legal residents of the State of Michigan may be admitted to said home without charge for tuition, boarding, lodging, washing, medicine or medical attendance. In the selection of **inmates** preference shall be given to indigent or pauper orphans, and when this class is provided for such others may be admitted for whom application may be made, and as accommodations

may be provided for by sufficient buildings. And when these classes are provided for other feeble-minded and epileptic persons who are entitled to admissions may be received at such institution.

Section 21. The object of said institution shall be to provide, by all proper and feasible means, the intellectual, moral and physical training of that **unfortunate portion of the community who have been born or by disease have become imbecile or feeble-minded or epileptic**, and by a judicious and well-adapted course of training and management to ameliorate their condition and to develop as much as possible their intellectual faculties **to reclaim them from their unhappy condition and fit them as far as possible for future usefulness in society.**

. . .

Section 26. The superintendents of the poor in each of the counties of the State in which there are or shall be persons of this class eligible to admission to this home by the provisions of this act, who have no contagious disease, and who are, or shall become chargeable to said county, or to any township therein, shall cause all; or any such persons to be taken to the home for the **feeble-minded** and **epileptic** and to be taken into the custody and care of said home, in accordance with the rules and regulations of said home. No person, however, shall be admitted to said home, until a certificate of admission has been issued for the admission of said person by some officer of said home duly authorized by the board of trustees to issue such certificate.

Section 27. The superintendents of the poor shall cause any and all such persons to be taken to the Home for the Feeble-minded and Epileptic at the expense of the county, and to be taken into [the] custody and care of the school in accordance with the rules and regulations of said home.

1893 Mich. Pub. Acts 418: AN ACT to provide for the location, establishment and organization of an **asylum for the insane** in the upper-peninsula.

Section 1. *The People of the State of Michigan enact*, That the members of the State Board of Corrections and Charities, shall, *ex officio,* constitute a board of locating commissioners for the purpose of selecting a site for an additional asylum for the insane.

Section 2. The said commissioners may receive by donation, within six months from and after the approval of this act, in a healthy, easily accessible **part of the upper peninsula of the State,** as a site for the **asylum**, a tract of land containing not less than four hundred acres, which shall be capable of being easily supplied with a sufficient quantity of living water for all the purposes of such an institution, and also to furnish proper facilities for drainage.

. . .

Marriage

MICH. COMP. LAWS § 551.6 (1990): Mental or venereal disease; incapacity; validation of white-African marriages; penalty; competency of witness.

. . .

Section 6. No **insane person**, **idiot**, or **person who has been afflicted with syphilis or gonorrhea** and has not been cured of the same, shall be capable of contracting marriage. All marriages heretofore contracted between white persons and those wholly or in part of African descent and hereby declared valid and effectual in law for all purposes; and the issues of such marriages shall be deemed and taken as legitimate as to such issue and as to both of the parents.

No person who has been confined in any public institution or asylum as a **feeble-minded**, **imbecile** or **insane patient**, or who has been adjudged **insane**, **feeble-minded** or an **imbecile** by a court of competent jurisdiction, shall be capable of contracting marriage without, before the issuance by the county clerk of the license to marry, filing in the office of the county clerk a verified certificate from 2 regularly licensed physicians of this state that such person has been completely cured of such **insanity**, **imbecility** or **feeble-mindedness** and that there is no probability that such person will transmit any of such **defects or disabilities** to the issue of such marriage. Any person of sound mind who shall intermarry with such **insane person** or **idiot** or person who has been so confined as **feeble-minded**, **imbecile** or **insane** patient, or who has been so adjudged **insane**, **feeble-minded** or an **imbecile**, except upon the filing of certificate as herein provided, with knowledge of the disability of such person, or who shall advise, aid, abet, cause, procure or assist in procuring any such marriage contrary to the provisions of this section, is guilty of a **felony** and on conviction thereof in any court of competent jurisdiction shall be punished by a **fine** of not more than $1,000.00 or by **imprisonment** in the state prison not less than 1 year nor more than 5 years, or by both such fine and imprisonment.

MICH. COMP. LAWS § 552.1 (1990): Invalidity of marriages; relationship of parties, bigamy, insanity, idiocy; legitimacy of issue.

Section 1. All marriages which are prohibited by law on account of consanguinity or affinity between the parties, or on account of either of them having a wife or husband then living, and all marriages solemnized when either of the parties was **insane or an idiot**, shall, if solemnized within this state, be **absolutely void.** The issue of such marriage shall be deemed legitimate.

. . .

Sterilization

1913 Mich. Public Acts, No. 34:

[Authorizing compulsory **sterilization** of **mentally defective** or **insane** institutional inmates.]

1923 Mich. Pub. Acts 453: AN ACT to authorize the sterilization of mentally defective persons . . . ., *amended by* 1929 Mich. Pub. Acts 689:

. . .

It [is] the policy of the state to **prevent the procreation** and increase in number of **feeble-minded, insane** and **epileptic** persons, **idiots, imbeciles, moral degenerates**, and sexual perverts, **likely to become a menace to society** or wards of the state. The provisions of this act are to be liberally construed to accomplish this purpose.

. . .

[Duty of state officials] to bring to the attention of the governing board or body of such institution and to the state welfare commission [any] **mentally defective person** who would be likely to procreate children unless closely confined or rendered incapable of procreation [for whom they believe it would be] for the **best interest of such person and of society that such mentally defective person should be sexually sterilized**.

Voting

MICH. CONST. art. II, § 2 (1963): Mental incompetence; imprisonment.

The legislature may by law exclude persons from voting because of **mental incompetence** or commitment to a jail or penal institution.

MINNESOTA

Housing Discrimination

MINN. STAT. ANN. § 245.821 (1998): Notice of establishment of facilities for treatment, housing or counseling of handicapped persons.

Subdivision 1. Notwithstanding any law to the contrary, no private or public facility for the treatment, housing, or counseling of more than five persons with **mental illness, physical disabilities, mental retardation** or related conditions, as defined in section 252.27, subdivision 1a, chemical dependency, or another form of dependency, nor any correctional facility for more than five persons, shall be established without **30 days written notice to the affected municipality or other subdivision**.

. . .

MINN. STAT. ANN. § 245A.11 (1998): Special conditions for residential programs.

. . .

Subd. 3. Permitted multifamily residential use. Unless otherwise provided in any town, municipal, or county zoning regulation, a licensed residential program with a licensed capacity of seven to 16 persons shall be considered a permitted multifamily residential use of property for the purposes of zoning and other land use regulations. A town, municipal, or county zoning authority may require a **conditional use or special use permit** to assure proper maintenance and operation of a residential program. Conditions imposed on the residential program must not be more restrictive than those imposed on other conditional uses

or special uses of residential property in the same zones, unless the additional conditions are necessary to protect the health and safety of the persons being served by the program. Nothing in sections 245A.01 to 245A.16 shall be construed to exclude or prohibit residential programs from single-family zones if otherwise permitted by local zoning regulations.

Subd. 4. Location of residential programs. In determining whether to grant a license, the commissioner shall specifically consider the population, size, land use plan, availability of community services, and the number and size of existing licensed residential programs in the town, municipality, or county in which the applicant seeks to operate a residential program. **The commissioner shall not grant an initial license to any residential program if the residential program will be within 1,320 feet of an existing residential program** unless one of the following conditions apply: (1) the existing residential program is located in a hospital licensed by the commissioner of health; (2) the town, municipality, or county zoning authority grants the residential program a conditional use or special use permit; (3) the program serves six or fewer persons and is not located in a city of the first class; or (4) the program is foster care.

Subd. 5. Overconcentration and dispersal. (a) Before January 1, 1985, each county having two or more group residential programs within 1,320 feet of each other shall submit to the department of human services a plan to promote dispersal of group residential programs. In formulating its plan, the county shall solicit the participation of affected persons, program, municipalities having highly concentrated residential program populations, and advocacy groups. For the purposes of this subdivision, **"highly concentrated" means having a population in residential programs serving seven or more persons that exceeds**

one-half of one percent of the population of a recognized planning district or other administrative subdivision.

(b) Within 45 days after the county submits the plan, the commissioner shall certify whether the plan fulfills the purposes and requirements of this subdivision including the following requirements:

(1) a new program serving seven or more persons must not be located in any recognized planning district or other administrative subdivision where the population in residential programs is highly concentrated;

(2) the county plan must promote dispersal of highly concentrated residential program populations;

(3) the county plan shall promote the development of residential programs in areas that are not highly concentrated;

(4) no person in a residential program shall be displaced as a result of this section until a relocation plan has been implemented that provides for an acceptable alternative placement;

(5) if the plan provides for the relocation of residential programs, the relocation must be completed by January 1, 1990. If the commissioner certifies that the plan does not do so, the commissioner shall state the reasons, and the county has 30 days to submit a plan amended to comply with the requirements of the commissioner.

. . .

Institutionalization

1909 Minn. Laws 72: Crippled and deformed children to be admitted to school for feeble-minded-conditions.

All **feeble-minded persons**, resident of the state, who, in the opinion of the superintendent of said school are of suitable age and capacity to receive instruction in said school and whose **defects** prevent them from receiving proper training in the public schools, and all **idiotic and epileptic persons** resident of the state may be admitted to their respective departments under such conditions and regulations as said board shall prescribe.

. . .

Any **crippled or deformed child** who is **helpless** and who cannot be benefited by treatment at the **State Hospital for Crippled and Deformed Children**, or any child who is **physically helpless** from any chronic disease of the nervous system or any child or adult suffering from such or other incurable **chronic invalidism**, may be admitted to said department for incurables in said institution in the discretion of and under such conditions as the board of control shall determine: *Provided,* however that this section shall not apply to those who are helpless from **insanity** or senile dementia, or whose presence shall, in the opinion of the superintendent of said institution be incompatible with the general purposes of the institution, as specified above.

. . .

Sterilization

1925 Minn. Laws 140, ch. 154:

[Authorizing residents of state institutions "to be sterilized by the operation of vasectomy or tubectomy."]

Voting

MINN. CONST. art. VII, § 2 (1857):

No person **under guardianship**, or who may be ***non compos mentis*** **or insane**, shall be entitled or permitted to vote at any election in this State.

MISSISSIPPI

Institutionalization

1920 Miss. Laws 288: AN ACT to provide for the establishment and maintenance of the **Mississippi School and Colony for the Feebleminded**; to define "feebleminded" and "poor person"; to provide for the admission, commitment and release of feebleminded persons; to provide for the care, treatment and training of the **feebleminded** in order to **prevent the multiplication of feebleminded** criminals and paupers; and to provide penalties for the violation of this act.

Section 1. *Be it enacted by the Legislature of the State of Mississippi:* that this act shall be known as the **Mental Deficiency Law of Mississippi**.

Section 2. *Definition of "feebleminded" and "poor person"* — that the term **"feebleminded,"** within the meaning of this act, shall apply to any and all persons with such a degree of **mental inferiority** from birth or from infancy or early childhood, that they are unable to care for themselves, to profit by ordinary public school instruction, to compete on equal terms with others, or to manage themselves and their affairs with ordinary prudence, and consequently constitute **menaces to the happiness or safety of themselves or of other persons in the community, and require care, supervision and control either for their own protection or for the protection of others.**

That the persons denominated **feebleminded** comprise those commonly called **idiots**, **imbeciles** and **morons**, or high grade **feebleminded persons**;

That feebleminded persons may, or may not, be subject to epileptic seizures. That repeated epileptic seizures do deteriorate mentality;

That the greatest danger of the feebleminded to the community lies in the frequency of the passing on of mental deficiency from one generation to another, and in the consequent propagation of criminals and paupers;

Section 3. Establishment of the Mississippi School and Colony for the Feebleminded — That there shall be established and maintained by the state of Mississippi a state institution, to be known as "**the Mississippi School and Colony for the Feebleminded**," for the care, training, employment and custody of **feebleminded** persons, and that this institution **shall have the power to receive and hold property**, real and personal, and shall have the same rights and privileges as are conferred by law on other eleemosynary institutions of Mississippi. The short title for the institution shall be "the Mississippi Colony."

. . .

Section 9. *Plan of the Mississippi Colony* — That the Mississippi Colony shall provide for the separate maintenance of the white and colored races; that it shall be arranged for the complete segregation of the sexes of each race; that it shall provide for the maintenance in separate cottages of **epileptics**; and that it shall provide for the separate maintenance of criminal and **immoral mental defectives.**

That the board of trustees and the superintendent shall plan the institution with a view to securing the most economical production of shelter, with the necessary distribution of heat, light and food, at the same time **securing the isolation and segregation required.**

That the institution shall provide for the training of all young persons to the fullest extent of which they are capable, and in a manner which shall best fit each for a life of usefulness. **Training in the use of the hands being considered of the highest importance, the educational activities of the institution shall be primarily directed toward perfecting the pupils in the arts of the farm, of the house, and of the shop.**

That provision shall be made for the frequent mental examination of every inmate of the institution, and for a **research department which shall study the causes of mental deficiency with a view to curtailing and preventing feeblemindedness in the state.**

. . .

Section 16. *Admission of minors to the Mississippi Colony* — That the father or mother, if they are living together, or whichever one of them has the custody of the child, if they are living apart, or the guardian of a child, may apply to the superintendent of the Mississippi Colony for the admission of such child to the Mississippi Colony, supplying such information as the superintendent and the board of trustees shall require, if, in the judgment of the applicant, the child is **feebleminded** or **epileptic**, and if said child is native in the state, or has been a resident of the state for the past five years. When such applications have been made to the superintendent, and when in his judgment, after physical and mental examination, the child is found to be feebleminded or epileptic, the superintendent may receive such child as an **inmate** in the colony.

When any such child is so admitted by the superintendent, the child then and there, by this act of the superintendent, becomes a ward of the state, and the Mississippi Colony shall from that time forward have

exclusive care, custody or control of such child, and shall cause him to be instructed and trained in such manner and degree as may be best suited to his capacity for learning until such time as said inmate shall be released therefrom by the board of trustees, by the superintendent, or by the order of a chancellor, or of a judge of the Supreme Court of Mississippi, rendered at chambers or otherwise, by due process of law.

Section 17. *Filing petition for commitment to the Mississippi Colony* — That the chancery courts have jurisdiction in all cases of legal inquiry in regard to **feeblemindedness**, including **idiocy, imbecility, and the higher grades and varieties of mental inferiority which render the subjects unfit for citizenship**. This jurisdiction may be exercised by the clerk of the chancery court, subject to the approval of the chancellor.

At any time, subject to the approval of the court, any relative of a **feebleminded** person, child or adult, may make application to the clerk of the chancery court to have him adjudged feebleminded; but **if the relatives of any feebleminded person shall neglect or refuse to make application to the clerk of the chancery court to have him adjudged feebleminded, and shall permit him to go at large, the clerk of the court shall, on the application, in writing and under oath, of a citizen of the county in question, issue a summon to the sheriff to summon the alleged feebleminded person and his parent, guardian or next friend to contest the application.**

The application shall request that the alleged feebleminded person be adjudged feebleminded, and in need of proper care. It shall state the facts upon which the allegation of feeblemindedness is based, and because of which the application is made.

. . .

Section 23. *Orders of commitment and conveyance to institutions* — That when the chancellor or any clerk of a chancery court presiding at an inquest concerning the feeblemindedness of any person, shall be satisfied that the person is feebleminded, and that for the safety or happiness of the feebleminded himself, or for the safety or happiness of other persons in the community, he should be committed to the Mississippi Colony, or to some other institution, it shall be the duty of said chancellor, or said clerk of the chancery court, to ascertain from the superintendent of the Mississippi colony, or other institution, to which it is designed to commit the person whose mental condition has been ascertained to be one of feeblemindedness, the chancellor, or clerk of the chancery court, shall issue an order of commitment to the Mississippi Colony, or other suitable institution, and such order shall be transmitted with the patient when he is conveyed to the institution.

. . .

Managing Own Affairs/Parenting

MISS. CODE ANN. § 41-21-45 (1990): Unlawful to cohabit with feeble-minded.

It shall be **unlawful** for any person to cohabit with or attempt sexual intercourse with a female who is **feebleminded,** as defined in section 41-19-101, after adjudication of such feeblemindedness.

Anyone convicted of either of these crimes, shall, upon conviction thereof, be punished by a **fine** of not less than one thousand dollars, or **imprisonment** of not less than one year in the penitentiary, or by both such fine and imprisonment.

Marriage

MISS. CODE. ANN. § 93-1-5 (2000): Conditions precedent to issuance of license; penalty for noncompliance.

It shall be unlawful for the circuit court clerk to issue a marriage license until the following conditions precedent have been complied with:

. . .

(f) In no event shall a license be issued by the circuit court clerk when it appears to the circuit court clerk that the applicants are, or either of them is, drunk, **insane** or **an imbecile**.

Sterilization

MISS. CODE ANN. § 41-45-1 (1972): Sexual sterilization of certain defectives authorized.

Whenever the director of the Mississippi State Insane Hospital, or of the East Mississippi Insane Hospital, or of the Ellisville State School, shall be of the opinion that it is for the **best interests of the patients and of society that any inmate of the institution under his care should be sexually sterilized,** such director is hereby authorized to perform, if he be a surgeon, the operation of sterilization on any such patient confined in such institution afflicted with **hereditary forms of insanity** that are **recurrent**, **idiocy**, **imbecility,** or **feeblemindedness**, provided that such director shall have first complied with requirements of this chapter.

Travel

1906 Miss. Laws 1011: Vessels bringing pauper immigrants, children, etc.

If any person commanding a ship, vessel, steamboat, or other water craft, shall import into this State, or bring to the shores or within the limits thereof any infant, **lunatic, maimed, aged, or infirm person**, or vagrant who is likely to become chargeable on the county, on the requisition of the supervisor of the district or the mayor of any city, town, or village, the captain, master, or commander of such ship, vessel, steamboat, or other water craft shall enter into bond, with sufficient sureties, payable to the county, conditioned to indemnify such county against all charges that may be incurred in the support and care of such person; and any captain, master, or commander failing or refusing to give the bond required shall forfeit and pay to the county the sum of two hundred dollars for each infant, **lunatic, maimed, aged, or infirm person**, or vagrant so brought into the State, to be recovered by action.

Voting

MISS. CODE ANN. § 123-15-11 (1990): Qualifications, generally.

Every inhabitant of this state, **except idiots and insane persons,** who is a citizen of the United States of America, eighteen (18) years old and upwards, who has resided in this state for thirty (30) days and for thirty (30) days in the county in which he offers to vote, and for thirty (30) days in the supervisor's district or in the incorporated city or town in which he offers to vote, and who shall have been duly registered as an elector by an officer of this state under the laws thereof, and who has never been convicted of any crime listed in Section 241, Mississippi Constitution of

1890 shall be a qualified elector in and for the county, municipality and voting precinct of his residence, and shall be entitled to vote at any election. No others than those above included shall be entitled, or shall be allowed, to vote at any election.

MISSOURI

Family

MO. REV. STAT. § 453.130 (1978): Decree of adoption may be set aside, when.

Whenever a person adopted under the provisions of this chapter shall develop **venereal infection as a result of conditions existing prior to the time such person was adopted, or shall develop feeblemindedness or epilepsy,** or shall prove to be a member of a race, the members of which are prohibited by the laws of this state from marriage with members of the race to which the parents by adoption belong, a petition setting forth such facts may be filed at any time within five years after such adoption with the court which decreed the adoption, and if on a hearing the facts in such petition are established, the said court may enter a decree **annulling the adoption** and setting aside any all rights and obligations that may have accrued by reason of said adoption.

Marriage

MO. REV. STAT. § 451.020 (1978): Certain marriages prohibited–official issuing licenses to certain persons guilty of misdemeanor.

All marriages between parents and children, including grandparents and grandchildren of every degree, between brothers and sisters of the half as well as the whole blood, between uncles and nieces, aunts and nephews, first cousins, and between persons either of whom is **insane, mentally imbecile or feeble-minded**, are prohibited and declared **absolutely void.**

Segregated Education

MO. ANN STAT. § 162.815(i) (West 1990): Voters may create special districts to educate severely handicapped and to provide vocational training to residents of district.

In all areas of this state the voters may organize and create a **special district** for the primary purposes of:

(1) Educating and training **handicapped** and **severely handicapped** children resident within the special district.

. . .

Travel

1901 Mo. Laws 132: Crimes and Punishments: Importation of Children.

Section 1. No association incorporated under the laws of any other state than the state of Missouri shall place any child in any family home within the boundaries of the state of Missouri, either with or without indenture, or for adoption, unless the said association shall have furnished the state board of charities and corrections with such guarantee as they may require that **no child shall be brought into the state of Missouri by such society or its agents having any contagious or incurable disease or being of feeble mind or of vicious character**, and that said association will promptly receive and remove from the state any child brought into the state of Missouri by its agents which shall become a public charge within the period of five years after being brought into this state.

Section 2. Any person who shall receive to be placed in a home, or shall place in a home any child on behalf of any

association incorporated in any other state than the state of Missouri, which shall not have complied with the requirements of the preceding section shall, upon conviction, be punished by imprisonment in jail not more than thirty days, or by fine of not less than five or more than one hundred dollars, or by both such fine and imprisonment.

Section 3. The necessity for this act going into effect at once on account of the fact that the New York children's aid society is pouring car loads of children into the state without properly supervising them, thereby burdening our commonwealth, creates an emergency within the meaning of the constitution; therefore, this act shall take effect and be enforced from and after its passage.

Voting

MO. CONST. art. VIII, § 2 (1974): Qualifications of voters–disqualifications.

[N]o person who has a guardian of his or her estate or person by reason of **mental incapacity**, appointed by a court of competent jurisdiction and no person who is **involuntarily confined in a mental institution** pursuant to a adjudication of a court of competent jurisdiction shall be entitled to vote, and persons convicted of felony, or crime connected with the exercise of the right of suffrage may be excluded by law from voting.

MO. ANN. STAT. § 115.115(5) (West 1990):

Each local election authority may designate **one** common site as an election day polling place designed for accessibility to the **handicapped** and elderly.

MONTANA

Institutionalization

1919 Mont. Laws 196: AN ACT relating to the admission, care and retention of **feeble-minded persons** and also persons afflicted with **epilepsy** to the Montana Training School for Feeble-Minded and a Department of the Montana School for the Deaf and Blind at Boulder . . . .

Section 1. There is hereby established at Boulder, Montana in connection with and under the control of the Montana school for the Deaf and Blind, a Montana Training School for Feeble-minded Persons, for the training and detention of **epileptics** and **feeble-minded** minors and adults: and said **unfortunates** are to be admitted to said institution and cared for therein as provided in this act.

. . .

MONT. CODE ANN. § 38-801 (1947): Montana state training school and hospital established.

That the institution heretofore established at Boulder, in Jefferson county, state of Montana, as a training school and hospital for the education, training and **detention** of **subnormal minors and adults** and **epileptics**, shall be known and designated as the "Montana state training school and hospital," and shall be under the general direction, supervision and control of the state board of education, with a local executive board appointed in the manner, and having the powers and duties granted to and imposed upon such local executive board by the provisions of sections.

. . .

Purposes and objects of school. The purpose and object of such school shall be the mental, moral and physical education and training of **subnormal persons whose defects prevent them from receiving proper instruction and training in the public schools, or who are so mentally deficient that they are incapable of managing themselves or their affairs independently with ordinary prudence** or of being taught to do so, or who require control and education for their own welfare and the welfare of others, and minors whose intelligence will not develop without such care; epileptics and subnormal adults whose defects prevent them from taking care of themselves or their property, or who, from social standards, are a **menace to society**.

Sterilization

MONT. CODE ANN. § 38-603 (1947): State board of eugenics created.

The state board of eugenics is hereby created and established for the state of Montana. It shall consist of: The chief physician of each custodial institution, the president of the state medical association, a female member named by the state medical association, and the secretary of the state board of health, the last named to be chairman of the board.

MONT. CODE ANN. § 38-604 (1947): Duties of the state board of eugenics.

It shall be the duty of this board to approve or disapprove certificate of **sterilization** submitted to them by the chief physician of custodial institution of inmate as provided in section 38-605 and to review the decision of the said chief physician in case of nonconsent on the part of the guardian, or best friend as provided in section 38-606. This board is also hereby empowered to exercise general supervision of matters pertaining to sterilization, over the

chief physician and assistants in custodial institutions, and require from them proper records and data for the determination of the efficiency, benefits and specific efforts of eugenical sterilization.

MONT. CODE ANN. § 38-605 (1947): Responsibility for sterilization.

The sterilization shall be performed by, or under the supervision of the chief physician of the custodial institution of said inmate, whenever he, by his competent examination, and upon the approval of the state board of eugenics finds the said inmate or inmates, to fall within the above named class or classes; provided, however, that before this sterilization takes place it shall be the duty of the said chief physicians to fill out appropriate certificate of said inmate or inmates to be sterilized and present same to the state board of eugenics and secure that board's approval thereof, (the approval to be evidenced by the appropriate endorsement on the back of said certificate by the secretary of said board).

MONT. CODE ANN. § 38-606 (1947): Consent of guardian or kin required before sterilization.

Before making out the certificate mentioned in the above paragraph it shall be the duty of the physician to secure the consent of the legal guardian of said inmate and in case such inmate has no legal guardian, then the consent of his or her nearest known kin within the state of Montana and if such inmate has no known kin within the state of Montana, then the consent of the custodial guardian of such inmate. In all cases when this consent is refused, it should be noted on the certificate by the chief physician, and it then becomes his duty to notify the inmate and his guardian, or nearest known kin within the state of Montana, and in case such inmate has no known kin within the state of Montana, then the custodial guardian of such inmate, of the proposed sterilization, setting

a date for him or them to appear before the state board of eugenics and to show cause why the sterilization should not take place. It shall then be the duty of the state board of eugenics to withhold the approval of the sterilization of said inmate until the said board has heard and passed upon the merits of the objection. At the hearing it shall be the duty of the state board of eugenics to approve or disapprove the sterilization.

Failure of complainants to appear at the hearing after due notices shall be considered as a waiver of all objections.

Upon the approval of the state board of eugenics, the secretary thereof shall endorse the approval on the back of the sterilization certificate of the inmate, and the chief physician shall cause sterilization to proceed as though consent were given.

All decisions of the state board of eugenics shall be appealable to the district court of the district in which the custodial institution of the inmate is located by the objecting party or parties hereinbefore mentioned by filing a petition against the state board of eugenics in the said court, in which case sterilization proceedings shall be suspended until final disposition of the case by the court.

MONT. CODE ANN. § 38-603 (1947): Purpose of acts not punitive.

The **purpose** of said findings and orders of said board and any operation performed thereunder, **shall be the betterment of the physical, mental, neural or psychic condition of said inmate, or to protect society from the menace of procreation by said inmate, and not in any manner as a punitive measure.**

Voting

MONT. CONST. art. IX, § 8 (1889):

No **idiot** or **insane person** shall be entitled to vote at any election in this State.

MONT. CONST. art. IV, § 2 (1979): Qualified elector.

Any citizen of the United States eighteen years of age or older who meets the registration and residence requirements provided by law is a qualified elector unless he is serving a sentence for a felony in a penal institution or is of **unsound mind**, as determined by a court.

NEBRASKA

Institutionalization

1885 Neb. Laws 255: AN ACT to establish and endow an Asylum Home for feeble-minded children and adults at or near the city of Beatrice, Nebraska, and making appropriation and levy therefor.

. . .

That there shall be established in the state of Nebraska an institution to be known and designated as "the Nebraska Institution for Feeble-Minded Youth."

Besides shelter and protection, the prime object of said institution shall be to provide special means of improvement for **that unfortunate portion of the community who were born, or by disease have become imbecile or feeble minded, and by a well adapted course of instruction reclaim them from their helpless condition, and, through the development of their intellectual faculties fit them as far as possible for usefulness in society.**

. . .

Section 7. All **imbecile** or **feeble minded** children and youth between the ages of five (5) and eighteen (18) years, who have been residents of state for the six months that preceded an application for admission, **and who are incapable of receiving instruction in common schools,** shall be entitled to be received into the institution, maintained and educated at the expense of the state, if in the judgment of the superintendent the applicant is a suitable person to receive the benefits.

. . .

Marriage

NEB. REV. STAT. § 42.103 (2000): Marriages; when void.

Marriages are void (1) when either party has a husband or wife living at the time of the marriage, (2) **when either party, at the time of marriage, is mentally incompetent to enter into the marriage relation**, and (3) when the parties are related to each other as parent and child, grandparent and grandchild, brother and sister of half as well as whole blood, first cousins when of whole blood, uncle and niece, and aunt and nephew. This subdivision extends to children and relatives born out of wedlock as well as those born in wedlock.

Segregated Education

NEB. REV. STAT. § 79-3337 (1990): Handicapped children; residential schools; establishment.

The State Department of Education is hereby authorized to **set up one or more approved schools for handicapped children.** These schools shall offer residential facilities for handicapped children which facilities shall be under the control and supervision of the State Department of Education.

Sterilization

1915 Neb. Laws 554:

[Authorizing the sterilization of the "feeble-minded," whose "children would probably become a social menace" and "would be harmful to society."]

Voting

NEB. CONST. art. VI, § 2 (1920): [Who disqualified]

No person shall be qualified to vote who is **non compose mentis**, or who has been convicted of treason or felony under the laws of the state or of the United States, unless restored to civil rights.

NEB. CONST. art. VI, § 2 (1995): [Who disqualified.]

No person shall be qualified to vote who is **non compos mentis,** or who has been convicted of treason or felony under the laws of the state or the United States, unless restored to civil rights.

NEVADA

Travel

NEV. REV. STAT. § 439.270(3) (1988): Physician to report to health division name, age and address of person diagnosed as epileptic.

The health division shall report, in writing, to the department of motor vehicles and public safety the name, age and address of every person reported to it as a case of **epilepsy**.

NEV. REV. STAT. § 439.270(3) (1988): Failure to use guide, hearing or helping dog, blaze orange leash or white cane admissible as evidence of contributory negligence in action against carrier of public accommodation.

The failure of a:

1. **Blind** person to carry a white or metallic colored cane or to use a guide dog or a blaze orange dog leash;

2. **Deaf** person to use a hearing dog or a blaze orange leash; or

3. **Physically handicapped** person to use a helping dog or a blaze orange dog leash, does not constitute contributory negligence per se, but may be admissible as evidence of contributory negligence in a personal injury action by that person against a common carrier or any other means of public conveyance or transportation or a place of public accommodation as defined by NRS 651.050 when the injury arises from the **blind, deaf or physically handicapped** person's making use of the facilities or

services offered by the carrier or place of public accommodation.

Voting

NEV. CONST. art. II, § 1 (1864):

Every male citizen of the United States (not laboring under the disabilities named in this Constitution) of the age of twenty-one years and upwards, who shall have actually, and not constructively, resided in the State six months, and in the district or county thirty days next preceding any election, shall be entitled to vote for all officers that now are or hereafter may be elected by the people; and upon all questions submitted to the electors at such election; *provided*, that no person who has been or may be convicted of treason or felony in any State or Territory of the United States, unless restored to civil rights, and no person who, after arriving at the age of eighteen years, shall have voluntarily borne arms against the United States, or held civil or military office under the so-called Confederate State, or either of them, unless an amnesty be granted to such by the Federal Government, **and no idiot or insane person, shall be entitled to the privilege of an elector.**

NEV. CONST. art. II, § 1 (1999): Right to vote. Qualifications of elector; qualifications of nonelector to vote for President and Vice President of United States.

All citizens of the United States (not laboring under the disabilities named in this constitution) of the age of eighteen years and upwards, who shall have actually, and not constructively, resided in the state six months, and in the district or county thirty days next preceding any election, shall be entitled to vote for all officers that now or hereafter may be elected by the people, and upon all questions submitted to the electors at such election; *provided*, that no

person who has been or may be convicted of treason or felony in any state or territory of the United States, unless restored to civil rights, and **no idiot or insane person shall be entitled to the privilege of an elector.**

NEW HAMPSHIRE

Institutionalization

1901 N.H. LAWS 597: AN ACT to provide for the care and education of feeble-minded children.

. . .

Section 1. The state shall establish and maintain a school for the care and education of the **idiotic** and **feeble-minded**, between three and twenty-one years of age, which shall be known as the **New Hampshire School for the Feeble-minded Children**. All children supported by towns or counties in the state, who in the judgment of the selectmen of towns or county commissioners of the county or state board of charities are capable of being benefited by school instruction, shall be committed to this institution.

. . .

Section 5. Whenever it is made to appear upon application to the judge of probate for any county, and after a proper hearing, that any child resident within said county, and who is not already in any almshouse, the industrial school, or the New Hampshire hospital, or supported by any town or county, is a fit subject for the New Hampshire School for Feeble-minded Children, such judge may commit such child to said New Hampshire School for Feeble-minded Children by any order of commitment directed to the trustees thereof, accompanied by the certificate of two physicians who are graduates of some legally organized medical college and have practiced three years in this state that such child is a suitable subject for said institution. Whenever, upon such application, there is occasion for the judge of probate to attend a hearing on days other than those fixed by statute as

the regular days for the sitting of the probate court he shall be allowed five dollars a day for his services and his expenses, which will be paid by the county treasurer upon the certificate of the county commissioners.

. . .

Section 7. **Feeble-minded** children shall be admitted to the institution in the following order: First, feeble-minded children now in public institutions supported entirely at public expense; second, the feeble-minded children not supported as aforesaid; third, the feeble-minded children of the state not in any public institution, who have no parents, kinsmen, or guardian able to provide for them, or who are committed by a judge of probate; fourth, those residing within the state whose parents, kinsmen, or guardian bound by law to support such children are able to pay; fifth, children of other states whose parents or guardians are able and willing to pay.

. . .

1905 N.H. Laws 413: An act in amendment of section 1, chapter 102, laws of 1901 in relation to the New Hampshire School for [the] feeble-minded.

Amend section 1, chapter 102, Laws of 1901, as amended by section 1, chapter 23, Laws of 1905, by striking out the words "feeble-minded girls" and inserting in place thereof the words the feeble-minded, and also by striking out the words "between three and twenty-one years of age" so that said section as amended shall read as follows: SECTION 1. The state shall establish and maintain a school for the care and education of the **idiotic** and **feeble-minded**, which shall be known as the New Hampshire School for the Feeble-Minded Children. All children supported by towns or counties in the state, who in the judgment of the selectmen of towns or country commissioners of the county or state board

of charities are capable of being benefited by school instruction, shall be committed to this institution. Provision shall also be made for the detention, care and custody of the **feeble-minded**, who are **inmates** of the school, after they reach the age of twenty-one, if in the judgment of the board of trustees their **segregation** seems to be for the best interests of the community.

. . .

Sterilization

1942 N.H. Laws 634: Authorization.

Whenever the superintendent of any state or county institution shall be of opinion that it is for **the best interests of the inmate and of society that any inmate of the institution under his care should be sexually sterilized**, such superintendent is hereby authorized to cause to be performed by some capable surgeon the operation of **sterilization** of any such inmate afflicted with **hereditary forms of insanity that are recurrent, idiocy, imbecility, feeble-minded** or **epilepsy**: provided that such superintendent shall have first complied with the requirements of this chapter; and said operation may be ordered by the superintendent if the board hereinafter authorized so directs and the order is not set aside or modified by the court as hereinafter provided.

. . .

The said board may deny the prayer of the said petition or if the said board shall find that the said inmate is **insane, idiotic, imbecile, feeble-minded** or **epileptic**, and by the laws of heredity is the **probable potential parent of socially inadequate offspring likewise afflicted**, that the said inmate may be **sexually sterilized** without detriment to

his or her general health, and that **the welfare of the inmate and of society will be promoted by such sterilization**, the said board may order the said superintendent to have performed by some competent surgeon to be named in such order, upon the inmate, after not less than thirty days from the date of such order, the operation of **vasectomy** if a male or of **salpingectomy** if a female; provided that nothing herein shall be construed to authorize the operation of castration nor the removal of sound organs from the body.

. . .

Travel

N.H. REV. STAT. ANN. § 155-A:1-a (1990): Exits.

Notwithstanding RSA 155-A:1, all new buildings constructed by the state or any of its agencies, and all new schools, halls, theaters or other public buildings in this state in which **more than 100 people** can be assembled shall be required to provide at least one entrance and exit designed so that the public areas of the entire building are accessible to the handicapped.

NEW JERSEY

Housing Discrimination

N.J. STAT. ANN. § 40:55D-66.1 (1995): Community residences for developmentally disabled or persons with head injuries; community shelters for victims of domestic violence; residential districts; conditional use permits.

Community residences for the **developmentally disabled,** community shelters for victims of domestic violence and community residences for persons with head injuries shall be a permitted use in all residential districts of a municipality, and the requirements therefor shall be the same as for single family dwelling units located within such districts; provided, however, that, in the case of a community residence for the **developmentally disabled,** community shelter for victims of domestic violence or community residence for persons with head injuries housing more than six persons, excluding resident staff, a zoning ordinance may require for the use or conversion to use of a dwelling unit to such a community residence or shelter, **a conditional use permit** in accordance with section 54 of the act to which this act is a supplement (C.40:55D-67). Any requirements imposed for the issuance of a conditional use permit shall be reasonably related to the health, safety and welfare of the residents of the district; provided, however, that **a municipality may deny such a permit to any proposed community residence for the developmentally disabled, community shelter for victims of domestic violence or community residence for persons with head injuries which would be located within 1500 feet of an existing such residence or shelter**; provided further, however that **a municipality may deny the issuance of any additional such permits if the number of persons, other than**

resident staff, resident at existing such community residences or community shelters within the municipality exceeds 50 persons, or 0.5% of the population of the municipality, whichever is greater.

Institutionalization

1898 N.J. Laws 267: AN ACT to provide for the establishment of a home for the care and training of feeble-minded women.

1. *Be it Enacted by the Senate and General Assembly of the State of New Jersey,* That there shall be established in this state a home for the care and training of **feeble-minded women**.

. . .

8. *And be it enacted.* That the governor shall send the **feeble-minded women** of this state to the said home in the manner and by the means provided in a supplement to an act entitled "An act for the instruction and maintenance **indigent deaf and dumb, blind and feeble-minded persons,** inhabitants of this state, which statement was approved March eighth, one thousand and eight hundred and eighty-eight.

. . .

1915 N.J. LAWS 277: AN ACT to amend the title and body of an act entitled "an act to provide for the establishment of a home for the care and training of feeble-minded women. . . ."

Be it enacted by the Senate and General Assembly of the State of New Jersey:

1. The title of the act to which this act is amendatory be and the same is hereby amended to read as follows: "An act to provide for the establishment of a State Institution for Feeble-Minded."

2. There shall be admitted to the institution established by an act entitled "An act to provide for the establishment of a home for the care and training of feeble-minded women," approved March twenty-seventh, one thousand eight hundred and eighty-eight, and the acts amendatory thereof and supplemental thereto, **mentally defective men, women and children, of all ages and grades, whether deaf, dumb, blind or otherwise**; *provided*, the medical superintendent of said institution shall first certify that there is sufficient accommodations in said institution for the care of such feeble-minded person.

. . .

Marriage

N.J. REV. STAT. § 37:1-9 (1959): When issuance of license prohibited.

No marriage license shall be issued when either of the contracting parties, at the time of making application therefor, is infected with gonorrhea, syphilis or chancroid in a communicable stage, is under the influence of intoxicating liquor or a narcotic drug, or is an imbecile or of an unsound mind.

. . .

Segregated Education

N.J. STAT. ANN. § 18A:35-4.8 (West 1990): Medical treatment or examination; objection of parent or guardian.

No pupil whose parent or guardian objects to such pupil receiving medical treatment or medical examination or physical examination shall be compelled to receive such treatment or examination; provided, however, that **no objection shall be made to a physical or medical examination of any physically handicapped child for the purpose of determining whether such child shall be admitted to any class or school for handicapped children** or of any pupil to determine whether he is ill or infected with a communicable disease or of any person who appears to be under the influence of a drug pursuant to P.L.1971, c. 390 (C. 18A:40-4.1).

N.J. STAT. ANN. § 30:6-16 (West 1990): Instruction of deaf and dumb, blind, mentally retarded or mentally deficient persons; children; rates.

An annual sum, the per capita amount of which for each pupil shall be fixed by the State House Commission, when appropriated by the Legislature, may be applied by the commission mentioned in section 30:6-1 of this Title for the instruction or **placing for instruction in a suitable and convenient institution or elsewhere, of deaf and dumb, blind or mentally retarded or mentally deficient persons or partially blind inhabitants of the State as the board may select.**

. . .

Whenever deemed necessary by the commission **blind babies and young children too frail or backward to enter other institutions for the blind shall be sent to some convenient and suitable institution in the State** where

special hospital care, instruction and support can be provided but the rate to be paid by the State including clothing and necessary transportation shall not exceed the rate fixed by the State House Commission.

. . .

Sterilization

1911 N.J. Laws, ch. 190:

[Authorizing the compulsory sterilization of "feeble-minded, epileptics, rapists and confirmed criminals."]

Voting

N.J. CONST. art. II, § 6 (1995):

No **idiot** or **insane person** shall enjoy the right of suffrage.

NEW MEXICO

Employment

N.M. STAT. ANN § 50-4-23 (Michie 1990): Handicapped persons; minimum wage; labor commissioner [director of the labor and industrial division] powers and duties.

A. The state labor commissioner [director of the labor and industrial division], to the extent necessary in order to prevent curtailment of opportunities for employment, shall, by regulation, provide for the **employment** under special certificates of individuals, including individuals employed in agriculture, whose earning or productive capacity is impaired by **physical or mental deficiency** or injury, **at wages which are lower than the minimum wage** applicable under Section 50-4-22 NMSA 1978, but not less than fifty percent of such wage.

. . .

May issue special certificates, which allow the holder thereof to **work at wages which are less than those required by Subsection A** of this section and which are related to the workers' productivity, **for the employment of**:

(1) **handicapped** workers engaged in work which is incidental to training or evaluation programs; and

(2) **multihandicapped individuals** and other individuals whose earning capacity is so severely impaired that they are unable to engage in competitive employment.

. . .

Institutionalization

1925 N.M. Laws 254: An Act to Establish in New Mexico a Home and Training School for Mental Defectives. . . .

Section 1. The words "mental defective" in this Act, shall be understood to mean any **person mentally underdeveloped** or **faultily developed** to the degree that he is incapable of managing himself and his affairs, and requires supervision, care and control for his own welfare, or for the **welfare of others, or for the welfare of the community**, and which **mentally defective person** is not classified as an insane person, nor merely **backward** or **mentally retarded**.

Section 2. There shall be established and hereafter maintained by this State an institution to be known as "**The Home and Training School for Mental Defectives**," for the care, custody, employment, education and training of mental defectives.

. . .

Any person over the age of twenty-one years may file with the clerk of the district court in the district wherein any such alleged **mentally defective** person resides, a petition and affidavit showing that there is within the jurisdiction of said court a person **mentally defective**, . . . and if upon examination and hearing had, such person shall be found to be mentally defective, within the definition and provisions of this Act, the court may enter its order for the transfer of the **mentally defective** person to the institution herein created.

Segregated Education

N.M. STAT. ANN. § 21-5-5 (Michie 1990): Parents and guardians **required to send blind students to institute**; exceptions.

Every parent, guardian or person having control or custody of any child who is between the ages of five and the age of majority, and who, **on account of a visual handicap[,] cannot be educated in the public schools, shall send such child to the New Mexico school for the visually handicapped** at Alamogordo during each school year for a period of seven years, unless the child is taught the subjects as are taught in the school in a private school, at home, or in a similar institution in another state, or unless the child is suffering from a physical or mental disability sufficient to incapacitate him from attending the school.

N.M. CONST. art. XII, § 5 (2000):

Every child of school age **and of sufficient physical and mental ability** shall be required to attend a public school.

Voting

N.M. CONST. art. VII, § 1 (1918): Elective Franchise.

Section 1. Every male citizen of the United States, who is over the age of twenty-one years, and has resided in New Mexico twelve months, in the county ninety days, and in the precinct in which he offers to vote thirty days, next preceding the election, **except idiots, insane persons**, persons convicted of a felonious or infamous crime, unless restored to political rights, and Indians not taxed, shall be qualified to vote at all elections for public officers.

. . .

N.M. CONST. art. VII, § 1 (1992): [Qualifications of voters; absentee voting; school elections; registration.]

Every citizen of the United States, who is over the age of twenty-one years, and has resided in New Mexico twelve months, in the county ninety days, and in the precinct in which he offers to vote thirty days, next preceding the election, except **idiots**, **insane persons**, persons convicted of a felonious or infamous crime, unless restored to political rights, shall be qualified to vote at all elections for public officers. The legislature may enact laws providing for absentee voting by qualified electors.

. . .

NEW YORK

Institutionalization

1919 N.Y. LAWS 1683: An Act in relation to mental defectives, constituting Chapter seventy-one of the consolidated laws.

. . .

This chapter shall be known as the "Mental Deficiency Law.

Section 2. Definitions. When used in this chapter:

. . .

"Mental defective" means any person afflicted with **mental defectiveness** from birth or from an early age to such an extent that he is incapable of managing himself and his affairs, who **for his own welfare or the welfare of others or of the community** requires supervision, control or care, and who is not insane or of unsound mind to such an extent as to require his commitment to an institution for the insane as provided by the insanity law;

. . .

Section 17. Colonies. Whenever in the judgment of the superintendent and the board of managers of any state institution for **mental defectives** there is a group of inmates in such institution of such a character that their interests and the interests of the state would both be better served through their **colonization** outside of such institution and if such colony can be established without damage to private property or **detriment to the public welfare** these facts may be

brought to the attention of the commission and if the commission shall approve, it may authorize the superintendent with the approval of the board of managers to establish such a colony.

. . .

Marriage

N.Y. DOM. REL. LAW § 7 (McKinney 2000): Voidable marriages.

A marriage is **void** from the time its nullity is declared by a court of competent jurisdiction if either party thereto:

. . .

2. Is incapable of consenting to a marriage for **want of understanding**;

3. Is incapable of entering into the married state from physical cause;

4. Consent to such marriage by reason of force, duress or fraud;

5. Has been **incurably mentally ill** for a period of five years or more.

Segregated Education

N.Y. EDUC. LAW § 3208 (McKinney 1947): Attendance of minors, proper mental and physical condition.

1. A minor included by the provisions of part one of this article shall be required to attend upon instruction only if in proper mental and physical condition.

2. A minor whose mental or physical condition is such that his attendance upon instruction under the provisions of part one of this article would endanger the health or safety of himself or of other minors, or who is **feebleminded to the extent that he is unable to benefit from instruction, shall not be permitted to attend.**

. . .

N.Y. EDUC. LAW § 3208 (McKinney 1990): Attendance; proper mental and physical condition.

1. A person included by the provisions of part one of this article shall be required to attend upon instruction only if in **proper mental and physical condition**.

2. A person whose mental or physical condition is such that his attendance upon instruction under the provisions of part one of this article would endanger the health or safety of himself or of others **shall not be permitted to attend.**

. . .

Sterilization

1912 N.Y. Laws 924:

[Act permitted sterilization of any institutionalized person who, in the judgment of the state board, "would produce children with an inherited tendency" to "feeble-mindedness, idiocy or imbecility."]

Travel

1847 N.Y. Laws 182, ch. 195: AN ACT concerning passengers in vessels coming to the city of New York.

. . .

Section 1. Within twenty-four hours after the arrival of any ship or vessel at the port of New-York, from any of the United States, other than this state, or from any country out of the United States, the master or commander of such ship or vessel, shall make a report in writing, on oath or affirmation, to the mayor of the city of New-York, or in case of his absence or other inability to serve, to the person discharging the duties of his office, which report shall state the name, place of birth, last legal residence, age and occupation of every person or passenger arriving in such ship or vessel, on her last voyage to said port, not being a citizen of the United States, and who shall have, within the last preceding twelve months arrived from any country out of the United States, at any place within the United States, and who shall not have paid the commutation money mentioned in the next section of this act, or have been bonded, or paid any commutation money, under the provisions of the act entitled "An act concerning passengers in vessels coming to the port of New-York," passed February 11, 1824: The said report shall contain a like statement of all such persons or passengers as aforesaid, as shall have been landed, or been suffered to land from any such ship or vessel, at any place during such last voyage, or who shall have been put on board, or been suffered to go on board of any other ship, vessel or boat, with the intention of proceeding to or through the said city of New-York: **The said report shall further specify whether an of said passengers so reported are lunatic, idiot, deaf and dumb, blind or infirm**, and if so, whether they are accompanied by relatives likely to be able to support them; and shall further specify particularly, the

names, last place of residence, and ages of all passengers who may have died during said last voyage of such vessel: In case any such master or commander shall omit or neglect to report as aforesaid, any such person or passenger, with the particulars aforesaid, or shall make any false report or statement in respect to any such person or passenger, in all or any of the particulars herein before specified, such master or commander shall forfeit the sum of seventy-five dollars for each such passenger, in regard to whom any such omission or neglect shall have occurred, or any such false report or statement shall be made, for which the owner or owners of every such ship or vessel, shall also be liable, jointly and severally, and which may be sued for and recovered as hereinafter provided.

. . .

Section 3. It shall be the duty of the commissioners of emigration hereinafter named, to examine into the condition of passengers arriving at the port of New-York in any such ship or vessel, and for that purpose all or any of the said commissioners, and such other person or persons as they shall appoint, shall be authorized to go on board, and through any such ship or vessel; and if on such examination, there shall be found among such passengers, any **lunatic**, **idiot**, **deaf and dumb**, **blind** or **infirm** persons, not members of emigrating families, and who, from attending circumstances, are likely to become permanently a public charge, they shall report the name to the said mayor particularly; and thereupon the said mayor, or the person discharging the duties of his office as aforesaid, shall, instead of the commutation money aforesaid, require, in the endorsement to be made as aforesaid, or in any subsequent endorsement or endorsements thereon, that the master or commander of such ship or vessel, with two sufficient sureties, shall execute a joint and several bond to the people of this state, in a penalty of three hundred dollars for every such passenger, conditioned to indemnify

and save harmless, each and every city, town and county within this state, from any cost or charge, which any such city, town or county shall incur, for the maintenance or support of the person or persons named in such bond, or any of them, within five years from the date of such bond. The sureties to the said bonds shall be required to justify before, and to the satisfaction of the officer making such endorsement, and by their oath or affirmation, shall satisfy such officer, that they are, respectively, residents of the state of New-York, and worth double the amount of the penalty of such bond, over and above all debts, liabilities, and all property exempt form execution.

Voting

N.Y. ELEC. LAW § 5-106 (McKinney 2000): Qualifications of voters; reasons for exclusion.

. . .

6. No person who has been adjudged incompetent by order of a court of competent judicial authority shall have the right to register for or vote at any election in this state unless thereafter he shall have been adjudged competent pursuant to law.

NORTH CAROLINA

Housing Discrimination

N.C. GEN. STAT. § 168-22 (1999): Family care home; zoning and other purposes.

(a) A family care home shall be deemed a residential use of property for zoning purposes and shall be a permissible use in all residential districts of all political subdivisions. No political subdivision may require that a family care home, its owner, or operator obtain, because of the use, a conditional use permit, special use permit, special exception or variance from any such zoning ordinance or plan; provided, however, that **a political subdivision may prohibit a family care home from being located within a one-half mile radius of an existing family care home.**

(b) A family care home shall be deemed a residential use of property for the purposes of determining charges or assessments imposed by political subdivisions or businesses for water, sewer, power, telephone service, cable television, garbage and trash collection, repairs or improvements to roads, streets, and sidewalks, and other services, utilities, and improvements.

Managing Own Affairs

N.C. GEN. STAT. § 111-4 (1990): Register of State's blind.

It shall be the duty of the Department of Human Resources to cause to be maintained **a complete register of the blind in the State of North Carolina**, which shall describe the condition, cause of blindness, capacity for education and industrial training of each, with such other

facts as may seem to the Department of Human Resources to be of value.

N.C. GEN. STAT. § 58-51-35 (1990): Insurers and others to afford coverage to mentally retarded and physically handicapped children.

(a) No insurance company licensed in this State pursuant to the provisions of Articles 1 through 64 of this Chapter and no corporation governed by the provisions of Articles 65 and 66 of this Chapter shall refuse to issue or deliver any individual or group accident and health insurance policy of hospital or medical service plan policy in this State which it is currently issuing for delivery in this State and which affords benefits or coverage for minor children of the applicant, by reason of the physical handicap or mental retardation of any minor children of the applicant, nor shall any such policy issued and delivered in this State carry a higher premium rate or charge or restrict or exclude coverage or benefits by reason of said mental retardation or physical handicap. **Provided, however, such policy may exclude benefits, otherwise payable for disability, hospitalization, or medical or other therapeutic expense directly and solely attributable to such mental retardation or such physical handicap.**

. . .

Marriage

N.C. GEN. STAT. § 51-3 (1977): Want of capacity; void and voidable marriages.

All marriages between any two persons nearer of kin than first cousins, or between double first cousins, or between a male person under 16 years of age and any female, or between a female person under 16 years of age and any

male, or between persons either of whom has a husband or wife living at the time of such marriage, or between persons either of whom is at the time physically impotent, or **between persons either of whom is at the time incapable of contracting from want of will or understanding shall be void.** No marriage followed by cohabitation and the birth of issue shall be declared void after the death of either of the parties for any of the causes stated in this section except for bigamy. No marriage by persons either of whom may be under 16 years of age, and otherwise competent to marry, shall be declared void when the girl shall be pregnant, or when a child shall have been born to the parties unless such child at the time of the action to annual shall be dead. A marriage contracted under a representation and belief that the female partner to the marriage is pregnant, followed by the separation of the parties within 45 days of the marriage which separation has been continuous for a period of one year, shall be voidable unless a child shall have been born to the parties within 10 lunar months of the date of separation.

Segregated Education

1965 N.C. Sess. Laws. 641: An Act to Amend Certain Section of Chapter 115 of the General Statutes Relating to the Public School System. . . .

. . .

Sec. 115-165. Children Not Entitled to Attend Public Schools. **A child so severally afflicted with mental, emotional, or physical incapacity as to make it impossible for such child to profit by instruction given in the public schools shall not be permitted to attend the public schools of the state.** In case the child is presented for enrollment in the public schools, it shall be the duty of the county or city superintendent of schools to make, or cause to be made by qualified psychologists and/or medical authorities, an

examination to determine whether said child can profit by attending the public schools. Upon a receipt of a report indicating that the child cannot profit from instruction given in the public schools the county or city superintendent of schools is hereby authorized to **exclude said child from the public schools**, a complete record of the transaction shall be filed in the office of the county or city superintendent, the office of the county director of public welfare, and the office of the county health officer, and shall be available to all parties concerned. **If the parent or guardian of such a child persists is forcing his attendance after such report has determined that the child should not attend the public schools, he shall be guilty of a misdemeanor and upon conviction shall be punished in the discretion of the court.**

Sterilization

1929 N.C. Sess. Laws 28:

. . .

[Superintendent] authorized and directed to have the necessary operation for **asexualization** or **sterilization** performed upon any **mentally defective** or **feeble-minded inmate** or patient thereof, as may be considered best in the interest of the mental, moral, or physical improvement of the patient or inmate, or **for the public good**.

. . .

Voting

N.C. GEN. STAT. § 163-69.2 (1990): Accessible polling places.

(a) The State Board of Elections shall promulgate rules to assure that any handicapped or elderly voter assigned to an **inaccessible polling place,** upon advance request of such voter, will be assigned to an accessible polling place. Such rules should allow the request to be made in advance of the day of the election.

(b) Words in this section have the meanings prescribed by P.L. 98-435.

NORTH DAKOTA

Institutionalization

1903 N.D. Laws 142: An Act to Establish an Institution for the Feeble Minded and to Provide for its Support and Management.

. . .

All **feeble minded persons** residents of this state who, in the opinion of the superintendent, are of suitable age and capacity to receive instruction in this institution, and whose **defects prevent them from receiving proper training** in the public schools of the state, and **all idiotic and epileptic** persons residents of this state may be admitted to and receive the benefits of this institution free of charge, subject to such rules and regulations as may be made by the board of trustees; and they shall be provided by their friends, relatives, or the county from which they come, sufficient funds to furnish them with proper clothing and transportation.

. . .

1909 N.D. Laws 222: An Act to Amend Section 1 of Chapter 213 of the Laws of 1909, Relating to the Inmates of the Institution for the Feeble Minded.

. . .

All **feeble minded persons** residents of this state, who, in the opinion of the superintendent, are of suitable age and capacity to receive instruction in the Institution for Feeble Minded, and whose **defects** prevent them from receiving proper training in the public schools of the state,

and all **idiotic** and **epileptic** persons resident of this state, may be admitted to and receive the benefits of the institution, subject to payment of the sums hereinafter provided, and to such rules and regulations as may be made by the Board of Control.

. . .

Section 3. Whereas, an emergency exists in the fact that there is now no law for compulsory commitment of **feeble minded persons obnoxious to the peace and good morals of the public**, therefore, this Act shall take effect and be in force from and after its passage and approval.

Marriage

N.D. CENT. CODE § 14-03-7 (1967): Marriages prohibited.

Marriage by a woman under the age of forty-five years or by a man of any age, unless he marries a woman over the age of forty-five years, is prohibited if such a man or woman is a chronic alcoholic, an habitual criminal, a **mentally deficient person**, an **insane person**, a person who has been afflicted with **hereditary insanity**, or with any contagious venereal disease.

N.D. CENT. CODE § 14-03-7 (1991): Prohibited marriages.

Marriage by a woman under the age of forty-five years or by a man of any age, unless he marries a woman over the age of forty-five years, is prohibited if such a man or woman is institutionalized as **severely retarded.**

Segregated Education

N.D. CENT. CODE § 15-34.1-02 (1981): Compulsory attendance – Deaf, blind, or mentally deficient persons.

Every parent, guardian, or other person who has control over any **deaf** child of at least four years of age, or control over any **blind**, or **mentally deficient** child of an age of seven years to twenty years, **shall send the child, if deaf, to the school for the deaf at Devils Lake or other adequate institution for the entire school year**, unless excused by the superintendent of that institution; and **if blind, to the school for the blind at Grand Forks or other adequate institution for the entire school year**, unless excused by the superintendent of said institution; and **if mentally deficient, to the Grafton state school or other adequate institution for the entire school year**, unless excused by the superintendent of that institution. Adequate institution shall mean any school, public or private, specializing in the training of handicapped children as stated.

N.D. CENT. CODE § 15-34.1-03 (1981): Compulsory attendance – Exceptions.

The parent, guardian, or other person having control of a child required to attend school by the provisions of this chapter shall be excused by the school board from causing the child to attend school whenever it shall be shown to the satisfaction of the board, subject to appeal as provided by law, that one of the following reasons exists:

That the child is in such physical or mental condition as to render attendance or participation in the regular or special education program inexpedient or impracticable.

Sterilization

N.D. CENT. CODE § 23-0863 (1943): Heads of State Institutions Report Persons Who Should Be Sterilized to Board of Examiners.

The warden, superintendent, or other head of the penitentiary, the state hospital for the insane, the state training school, and the Grafton state school shall report quarterly to the board of examiners each **feeble-minded**, **insane**, and **epileptic** person and each habitual criminal, moral degenerate, and sexual pervert within his institution **who is a potential producer of offspring and who, because of the inheritance of inferior or antisocial traits, probably would become social menaces or wards of the state.** The criminals who shall come within the operation of the provisions of this chapter shall be those who are moral degenerates and sexual perverts or who are addicted to the practice of sodomy, the crime against nature, or to other gross, bestial, and perverted sexual habits and practices prohibited by statute.

N.D. CENT. CODE § 23-0806 (1943): When Sterilization Ordered.

If, in the judgment of all the members of the board of examiners, **procreation by any person reported to it under the provision of this chapter would produce children with an inherited tendency to feeble-mindedness, insanity, epilepsy**, criminality, or degeneracy, and **there is no probability that the condition of the person so examined will improve to such an extent as to render procreation by any such person advisable, or if the physical or mental condition of any such person will be substantially improved by sterilization**, the board, after the examination and hearing, shall make an order requiring the person to be **sterilized**.

N.D. CENT. CODE § 23-0815 (1943): Purpose of Sterilization: Not Used as Punitive Measure.

The purpose of an examination, findings, and order of the board of examiners provided for in this chapter shall be the betterment of the physical, mental, neural, or psychic condition of the inmate, or the **protection of society from the menace of procreation by said inmate**, and shall not in any manner be used as a punitive measure. No person shall be sterilized under the authority of this chapter unless such operation shall be found to be necessary to improve the physical, mental, neural, or psychic condition of the inmate or to **prevent such inmate from producing offspring that would become a menace to society or a ward of the state**.

Voting

N.D. CONST. art. V, § 127 (1889):

No person who is **under guardianship, no compos mentis or insane**, shall be qualified to vote at any election, nor shall any person convicted of treason or felony, unless restored to civil rights.

N.D. CONST. art. II, § 2 (1998):

No person who has been declared **mentally incompetent** by order of a court or other authority having jurisdiction, which order has not been rescinded, shall be qualified to vote.

OHIO

Housing Discrimination

OHIO REV. CODE ANN. § 5123.19 (2000): Residential facilities; licensing; inspection; operation.

. . .

(B) Every person or government agency desiring to operate a residential facility shall **apply for licensure** of the facility to the director of mental retardation and developmental disabilities unless the residential facility is subject to section 3721.02, 3722.04, 5103.03, or 5119.20 of the Revised Code. Notwithstanding Chapter 3721. of the Revised Code, a nursing home that is certified as an intermediate care facility for the mentally retarded under Title XIX of the "Social Security Act," 49 Stat. 620 (1935), *42 U.S.C.A. 301*, as amended, shall apply for licensure of the portion of the home that is certified as an intermediate care facility for the mentally retarded.

. . .

In accordance with Chapter 119. of the Revised Code, the director shall adopt and may amend and rescind rules for licensing and regulating the operation of residential facilities. The rules shall establish the following:

(1) Procedures for issuing, denying, and revoking licenses;

(2) Fees for issuing licenses;

(3) Procedures for the inspection of residential facilities;

(4) Requirements for the training of residential facility personnel;

(5) Classifications for the various types of residential facilities;

(6) Certification procedures licenses and management contractors that the director determines are necessary to ensure that they have the skills and qualifications to properly operate or manage residential facilities;

(7) The maximum number of persons who may be served in a particular type of residential facility;

(8) Uniform procedures for admission of persons to and transfers and discharges of persons from residential facilities;

(9) Other standards for the operation of residential facilities and the services provided at residential facilities;

(10) Procedures for waiving any provision of any rule adopted under this section.

. . .

(J) Before issuing a license under this section to a residential facility that will accommodate at any time more than one **mentally retarded** or **developmentally disabled** individual, the director shall, by first class mail, **notify** the following:

(1) If the facility will be located in a municipal corporation , the clerk of the legislative authority of the municipal corporation;

(2) If the facility will be located in unincorporated territory, the clerk of the appropriate board of county commissioners and the clerk of the appropriate board of township trustees.

The director shall not issue the license for ten days after mailing the notice, excluding Saturdays, Sundays, and legal holidays, in order to give the notified local officers time in which to comment on the proposed issuance.

Any legislative authority of a municipal corporation, board of county commissioners, or board of township trustees that receives notice under this division of the proposed issuance of a license for a residential facility may comment on it in writing to the director within ten days after the director mailed the notice, excluding Saturdays, Sundays, and legal holidays. If the director receives written comments from any notified officials within the specified time, the director shall make written findings concerning the comments and the director's decision on the issuance of the license. If the director does not receive written comments from any notified local officials within the specified time, the director shall continue the process for issuance of the license.

(K) Any person may operate a licensed family home as a permitted use in any residential district or zone, including any single-family residential district or zone, of any political subdivision. Family homes may be required to comply with area, height, yard, and architectural compatibility requirements that are uniformly imposed upon all single-family residences within the district or zone.

(L) Any person may operate a licensed group home as a permitted use in any multiple-family residential director or zone of any political subdivision, except that a political subdivision that has enacted a zoning ordinance or resolution establishing planned unit development districts may **exclude**

group homes from such districts, and a political subdivision that has enacted a zoning ordinance or resolution may **regulate group homes** in multiple-family residential districts or zones as a conditionally permitted use or special exception, in either case, under reasonable and specific standards and conditions set out in the zoning ordinance or resolution to:

(1) Require the architectural design and site layout of the home and the location, nature, and height of any walls, screens, and fences to be compatible with adjoining land uses and the residential character of the neighborhood;

(2) Require compliance with yard, parking, and sign regulations;

(3) **Limit excessive concentration of homes.**

. . .

Institutionalization

1919 OHIO LAWS 430: To provide an additional institution for the custody and care of the feeble-minded and to make appropriation therefor.

Be it enacted by the General Assembly of the State of Ohio:

Section 1. In addition to the institution for feeble-minded, an additional institution of the state for the custody supervision, control, care, maintenance and training of **feeble-minded persons** committed to the custody and care of the Ohio board of administration shall be established and located, in the northern or in the southern part of the state, **at such point as the Ohio board of administration may be determine to be most suitable therefor and best adapted to the public convenience and welfare**, having regard to the

location of the present institution for feeble-minded, the centers of population in the northern and southern parts of the state, respectively, the availability of land suitable for such institution, and due economy in the acquisition of desirable site, provided, however, that nothing herein contained shall prevent the Ohio board of administration in its discretion from receiving in any of the institutions for feeble-minded, feeble-minded persons committed to its custody and care from any county in the state.

. . .

Segregated Education

OHIO REV. CODE ANN. § 3321.04 (Anderson 1975): Compulsory attendance.

Every parent, guardian, or other person having charge of any child of compulsory school age who is not employed under an age and schooling certificate and who has **not been determined to be incapable of profiting substantially by further instruction**, must send such child to a school, which conforms to the minimum standards prescribed by the state board of education, for the full time the school attended is in session, which shall not be for less than thirty-two weeks per school year. Such attendance must begin within the first week of the school term or within one week of the date on which the child begins to reside in the district or within one week after his withdrawal from employment.

OHIO REV. CODE ANN. § 3325.02 (Anderson 1985): Admission to school for the blind.

Subject to the regulations adopted by the state board of education, the state school for the blind shall be open to receive such blind and partially blind persons, residents of this state, who, in the judgment of the superintendent of

public instruction and the superintendent of the school for the blind, due to such handicap, **cannot be educated in the public school system** and are suitable persons to receive instructions according to the methods employed in such school.

Voting

OHIO CONST. art. V, § 6 (1918): Idiots or insane persons.

No **idiot,** or **insane person**, shall be entitled to the privileges of an elector.

OHIO CONST. art. V, § 6 (1994): Idiots or insane persons.

No **idiot**, or **insane person**, shall be entitled to the privileges of an elector.

OKLAHOMA

Housing Discrimination

OKLA. STAT. ANN. tit. 41, § 113.1 (West 1990): Denial or termination of tenancy because of guide, signal or service dog.

A landlord shall not deny or terminate a tenancy to a blind, deaf, or physically handicapped person because of the guide, signal, or service dog of such person **unless such dogs are specifically prohibited in the rental agreement** entered into prior to November 1, 1985.

OKLA. STAT. tit. 60, § 863 (1999): Establishment of group home-- Procedure.

A. 1. A group home is a residential use of property for the purposes of zoning and shall be treated as a permitted use in all residential zones or districts, including all single-family residential zones or districts of all political subdivisions of this state. No political subdivision may require that a group home, its owner, or operator obtain a conditional use permit, special use permit, special exception, or variance different from those required for other dwellings of similar density in the same zone; provided, however, prior to the establishment of a group home in any residential area within a political subdivision, the owner of such home shall file with the political subdivision an application for the establishment of such group home in such residential area. **The political subdivision shall provide for notice to be given to all affected real property owners.** The notice shall contain a legal description of the property and the street address or approximate location of the group home.

For the purposes of this section, the term "=bwpt=affected real property owners=ewpt=" shall mean all owners of real property which is located within thee hundred (300) feet of the exterior boundary of the property on which the group home is to be located. The political subdivision may deny the application if the owner of the group home fails to obtain a license from the Department of Human Services or if the group home fails to comply with the spacing requirements of subsection B of this Section.

. . .

2. For the purposes of safeguarding the health and safety of persons with developmental or physical disabilities and avoiding an over-concentration of group homes, either along or in conjunction with similar community-based residences, within one hundred eighty (180) days of the effective date of the Community Residential Living for Persons with Development or Physical Disabilities Act, the Commission for Human Services shall promulgate rules which shall encompass the following matters:

a. limitations on the number of new group homes to be permitted on blocks, block faces, and other appropriate geographic areas, to **one thousand two hundred (1,200) feet between group homes, or similar community residential facilities serving persons in drug, alcohol, juvenile, child, parole, and other programs of treatment, care supervision, or rehabilitation in a community setting,**

. . .

C. In order to facilitate the implementation of subparagraph a of paragraph 2 of subsection B of this section, the Department **shall maintain a list of the location, capacity, and current occupancy of all group homes.** The Department shall ensure that this list shall not contain the

names or other identifiable information about any residents of such home and that copies of this list shall be available upon request to any resident of this state and any state agency or political subdivision.

Institutionalization

1909 Okla. Sess. Laws 534: AN ACT to establish an institution for the care, training and custody of **feeble-minded, idiotic**, and **imbecile** children; and the care and custody of **feeble minded,** idiotic and **imbecile female** adults. . . .

Section 1. There is hereby established on section 33, township 23 North, range 6, West of Indian Meridian in Garfield county, Oklahoma, an institution to be known as the **Oklahoma Institution for the Feeble-minded.**

. . .

Section 3. The purposes of said institution shall be to care for, support, train and instruct **feeble-minded** children, and care for, support and **control female imbeciles** between the ages of sixteen and forty-five years. Until a special institution for epileptics shall be established by the State of Oklahoma, the board of managers may also admit **epileptics** to said institution so far as they shall have room for them, under such rules and regulations as may be prescribed by the said board of managers and approved by the Governor of the state; provided, that so long as there shall be sufficient room not occupied by feeble-minded children, the said board of managers may also admit feeble-minded persons of an age, provided that the parents, guardian or friends of such feeble-minded persons shall pay the entire cost of their support and furnish their clothing as hereinafter provided.

. . .

Section 5. Said institution shall be divided into two distinct departments, viz: A training school department and an asylum department. Each of these said departments may be divided in such manner as the board of managers may designate. In all cases a strict separation of the sexes shall be enforced. The inmates of the training school department shall be the **feeble-minded** and **imbecile children of the higher grade who are capable of receiving instruction and training**. The inmates of the asylum department shall be the **feeble-minded and idiotic children of the lower grade who are not capable of receiving instruction, and the female adults**. As soon as there shall be suitable buildings provided for the purpose, the **adult females shall be strictly separated from all other classes; provided, that such of the adult females as are capable of domestic or other labor may be employed in any part of the institution where their labor can be utilized;** provided; further, that the superintendent with the approval of the board of managers, may transfer any inmate from the training school department to the asylum department, or from the asylum department to the training department.

. . .

Managing Own Affairs

OKLA. STAT. ANN. tit. 37, § 537 (West 1990): Enumerated prohibited acts.

A. No person shall:

. . .

2. Sell, deliver or knowingly furnish alcoholic beverages to an intoxicated person or to any person who has been adjudged insane or **mentally deficient**.

. . .

Segregated Education

OKLA. STAT. ANN. tit. 70, § 1744 (West 1990): Compulsory education.

Every parent, company, guardian, corporation, association, person or persons, within the State of Oklahoma, having control or charge of any **deaf child** or person, between the ages of seven (7) and twenty-one (21), **shall be required to send such child or person to some suitable school, where deaf children are taught and educated**, for a period of at least six (6) months in each year; provided that this shall not apply to any such child or person where skilled private instruction is given for the same length of time each year.

OKLA. STAT. ANN. tit. 70, § 1210.171 (West 1990): Appropriate education for deaf or hard-of-hearing children.

A. It shall be the right of every child who is **deaf or so hard of hearing that he cannot participate in the regular public school program** to receive an appropriate education at the expense of the State of Oklahoma. It shall be the duty of every school district to seek out and identify every such child between the ages of two (2) and twenty-one (21) years at the earliest possible age under procedures to be prescribed by regulations of the State Department of Education. **It shall be the duty of every parent or other person having custody of such child to cause such child to be enrolled in and attend a school which provides special education for such deaf children.**

Sterilization

1931 Okla. Sess. Laws 80:

[Authorizing the compulsory sterilization of persons afflicted with "idiocy" or "imbecility."]

Voting

1910 Okla. Sess. Laws. 284: Senate Concurrent Resolution No. 31. Suggesting an amendment to the Constitution.

. . .

No person shall be registered as an elector of this state, or be allowed to vote in any election held herein, **unless he be able to read and write any section of the Constitution of the State of Oklahoma;** but no person who was, on January 1, 1866, or at any time prior thereto entitled to vote under any form of government, or who at that time resided in some foreign nation and no lineal descendant of such person shall be denied the right to register and vote because of his inability to so read and write sections of such Constitution.

OKLA. CONST. art. III, § 1 (1917): Suffrage.

. . .

Provided, that no person adjudged guilty of a felony, subject to such exceptions as the legislature may prescribe, nor any person kept in a poor house at public expense, except Federal, Confederate and Spanish-American ex-soldiers or sailors, nor any person in a public prison, **nor any idiot or lunatic, shall be entitled to register and vote.**

Okla. Const. art. III, § 1 (1952): Qualifications of electors – Persons disqualified.

That no person adjudged guilty of a felony after the adoption of this constitution, subject to such exceptions as the legislature may prescribe, unless his citizenship shall have been restored in the manner provided by law; nor any person, while kept in a poorhouse or other asylum at the public expense, except Federal and confederate ex-solders; nor any person in a public prison, nor any **idiot** or **lunatic** shall be entitled to vote at any election under the laws of this State.

OKLA. CONST. art. III, § 1 (1965): Qualifications of electors – Persons disqualified.

. . .

No person shall be qualified elector of this state who is adjudged guilty of a felony, who is detained in a penal or correction institution, **who is a patient in an institution for mental retardation, or who has been committed, by judicial order, to an institution for mental illness**.

OREGON

Employment

1913 Or. Laws 92:

[Special licenses can be obtained to allow "**crippled**" women to be hired to **work for less than minimum wage.**]

OR. REV. STAT. § 653.030 (1989): Commissioner may prescribe lower rates in certain cases.

The commissioner shall issue rules prescribing the employment of other types of persons at fixed minimum hourly wage rates lower than the minimum wage rate required by ORS 653.025, when the commissioner has determined that the application of ORS 653.025 would substantially curtail opportunities for employment for specific types of persons. **The types of persons for whom a minimum hourly wage rate may be set are limited to persons who are mentally or physically handicapped** or who are student-learners.

Institutionalization

1907 Or. Laws 144: AN ACT. Creating the State Institution for Feeble-Minded, and providing for its support, maintenance, management, and control; the admission, support, transfer and discharge of its inmates, and the payment of their expenses, and appropriating money therefor.

Be it enacted by the State or Oregon:

Section 1. There shall be established an institution for the training, care and custody of **feeble-minded, idiotic,**

and **epileptic** persons under the name and style of the "State Institution for Feeble-Minded."

. . .

Section 8. All **feeble-minded persons** who are residents of the State, who, in the opinion of the superintendent of said institution, are of suitable age and capacity to receive instruction in said institution, and **whose defects prevent them from receiving proper training in the public schools,** and all **idiot** and **epileptic persons** who are, and have been for a period not less than one year, residents of the State, may be admitted to their respective departments in said institution under such conditions and regulations as the board of trustees may provide.

. . .

Marriage

1921 Or. Laws 343:

[Physician check up requirement was extended to include both the man and the woman seeking to enter the marriage relation. In addition to checking to see if the parties were free from venereal disease, it was the physician's duty to make sure the parties met the **appropriate standard of "mentality**."]

Segregated Education

1929 Or. Laws 357:

[Duty to provide educational opportunities for handicapped children either through **home school** or through setting up a **separate school**.]

Sterilization

1923 Or. Laws. 397:

. . .

The Superintendent of the Oregon state hospital, state institutions for the feeble-minded, the Oregon state penitentiary, the Oregon state training schools for boys, the Oregon state industrial school for girls, and all Oregon state health officers shall report for all persons who are **feeble-minded, epileptic**, habitual criminals, moral degenerates, and sexual perverts, who are, **or in his opinion, are likely to become a menace to society**. If convicted of rape, sodomy, or crime against nature, or any other crime specified in section 14-734 of Oregon code, or of attempting to commit any of said crimes, copy of record of conviction shall be forwarded to the State Board of Eugenics.

. . .

1923 Or. Laws 280:

. . .

Board of Eugenics shall examine the "innate traits" and if the board thinks the person **would produce children "having a tendency" to "feeble-minded, insanity, epilepsy, criminality, or degeneracy** or who would probably become a ward of the state" and there is no probability of improvement of the individual then the **Board has a "duty" to order sterilization of the individual.**

. . .

Voting

OR. CONST. art. II, § 3 (1918): Suffrage and Elections.

. . .

Section 3. No **idiot** or **mentally diseased** person shall be entitled to the privilege of an elector.

. . .

PENNSYLVANIA

Institutionalization

1913 PA. LAWS 494: AN ACT supplementing and amending an act, entitled "An act to provide for the selection of a site and the erection of a State Institution for the Feeble-Minded and Epileptic, to be called the Eastern Pennsylvania State Institution for the Feeble-Minded and Epileptic, and making an appropriation therefor," approved the fifteenth day of May, Anno Domini one thousand nine hundred and thirteen.

. . .

Section 1. Be it enacted . . . , that the Eastern Pennsylvania State Institution for the Feeble-Minded and Epileptic shall be devoted to the **segregation**, care, maintenance, treatment, training, and education of **epileptic**, **idiotic**, **imbecile**, or **feeble-minded** persons of both sexes.

. . .

1913 PA. LAWS 1319: To establish a State village for feeble-minded women; . . . and providing for the commitment thereto of feeble-minded females between the ages of sixteen and forty-five years . . . .

Section 1. Be it enacted. . . ., that a **State village for feeble-minded women,** for the care of feeble-minded women between the ages of sixteen and forty-five, is hereby constituted and established, the ground and buildings for which are hereby directed to be selected and constructed, which village shall be governed and maintained in the manner hereafter provided, and shall be known as the Pennsylvania Village for Feeble-Minded Women. That this institution shall be entirely and specifically devoted to the

reception, **segregation, detention**, care and training of feeble-minded women of child-bearing age; and shall be so planned, in the beginning and construction, as **shall provide separate classification of the numerous groups embraced under the terms "idiotic" "imbecile," or "feeble-minded."** It is specifically determined that the **processes of an agricultural training shall be primarily considered in the educational department**; and that the employment of the inmates in the care and raising of stock, and the cultivation of fruits, vegetables, roots, et cetera, shall be made tributary to the maintenance of institution.

. . .

PA. STAT. ANN. tit 11, § 302 (West 1990): § 302. Children not to be kept in poorhouses.

It shall be unlawful for the overseers or guardians or directors of the poor, in the several counties, cities, boroughs, and townships of this Commonwealth, to receive into, or retain in, any almshouse or poorhouse, any child between two and sixteen years of age, for a longer period than sixty days, **unless such child shall be an unteachable idiot, an epileptic, or a paralytic, or otherwise so disabled or deformed as to render it incapable of labor or service.**

Marriage

PA. STAT. ANN. tit. 48, § 1-5 (WEST 1965): Restrictions on the issue of marriage license.

No license to marry shall be issued by any clerk of the orphans' court.

. . .

(e) If either of the applicants is or has been, within five years preceding the time of the application, an **inmate** of an institution for **weak-minded**, **insane**, or persons of **unsound mind**, unless a judge of the orphans' court shall decide that it is for the best interest of such applicant and the general public to issue the license, and shall authorize the clerk of the orphans' court to issue the license.

PA. STAT. ANN. tit. 48, § 1-5 (WEST 1990): Restrictions on the issue of marriage license.

No license to marry shall be issued by any clerk of the orphans' court.

. . .

(d) If either of the applicants for a license is **weak-minded**, **insane**, of **unsound mind**, or is **under guardianship as a person of unsound mind** unless a judge of the orphans' court shall decide that it is for the best interest of such applicant and the general public to issue the license, and shall authorize the clerk of the orphans' court to issue the license.

Segregated Education

PA. STAT. ANN. § 13-328 (West 1990): Compulsory education of **physical defectives**.

Every parent, guardian, or other person, having control or charge of any child of compulsory school age who is **deaf** or **blind**, or is so **crippled**, or whose hearing or vision is so **defective** as to make it **impracticable to have such child educated in the public schools** of the district in which he is a resident, shall allow such child to be sent to some school where proper provision is made for the education of the deaf, or of the blind, or of crippled children, or shall

provide for the tuition of such child by a legally certified private tutor.

RHODE ISLAND

Employment

R.I. GEN. LAWS § 5-25-14 (1998): Grounds for refusal to issue, refusal to renew, revoke, or suspend a license. [veterinary license].

. . .

(13) Lack of fitness to practice by reason of **mental** or **physical impairment** or otherwise.

. . .

R.I. GEN. LAWS § 30-3-24 (1998): Discharge of officers.

A commissioned officer or warrant officer of the national guard **may be discharged** and his or her commission or warrant terminated, by reason of death, by acceptance by proper authority of resignation, on account of inefficiency, **on account of physical disability**, absence without leave for three (3) months, dismissal pursuant to sentence of a general court-martial or special court-martial, removal from the state, and upon disbandment of an organization, withdrawal of federal recognition, and for such other reasons as may be prescribed by the governor.

Institutionalization

1907 R.I. Pub. Laws 89: An Act for the Establishment, Maintenance, Management and Control of the Rhode Island School for the Feeble-Minded.

It is enacted by the General Assembly as follows:

Section 1. A school to be known as the **Rhode Island School for the Feeble-Minded** shall be established and shall be under the management and control of the state board of education.

. . .

Managing Own Affairs

R.I. GEN. LAWS § 40-9-15 (1990): Reports of blindness of persons.

(a) Whenever, upon examination at a clinic, hospital, or other institution, or elsewhere, by a physician, optometrist or other person, the visual acuity of any person is found to be 20/200 or less in the better eye with the best correction, or the visual acuity is better than 20/200 if the widest diameter of the field of vision subtends an angle no greater than twenty (20) degrees, the superintendent or other person in charge of the clinic, hospital, or other institution, or the physician, optometrist or other person who conducted or was in charge of the examination if it took place elsewhere than in the clinic, hospital, or other institution, shall within thirty (30) days report to the director of the department of human services the result of the examination, and that the blindness of the person examined has been established.

Marriage

R.I. Gen. Laws § 15-1-5 (1988): Bigamous marriages void – marriage of lunatics and idiots.

Any marriage when either of the parties thereto, at the time of the marriage, has a former wife or husband living who has not been, by final decree, divorced from such party, and any marriage where either of the parties thereto is an

idiot or a **lunatic** at the time of the marriage, shall be **absolutely void**, and no life estate created by chapter 25 of title 33 shall be assigned to any widow in consequence of the marriage, and the **issue of the marriage shall be deemed illegitimate** and subject to all the disabilities of illegitimate issue.

Parenting

R.I. GEN. LAWS § 15-7-7 (1998): Termination of parental rights.

(a) The court shall, upon a petition duly filed by a governmental child placement agency or licensed child placement agency after notice to the parent and hearing thereon, terminate any and all legal rights of the parent to the child, including the right to notice of any subsequent adoption proceedings involving the child, if the court finds as a fact by clear and convincing evidence that:

. . .

(i) **Emotional illness, mental illness, mental deficiency**, or **institutionalization of the parent**, including imprisonment, of such a duration as to render it improbable for the parent to care for the child for an extended period of time.

Segregated Education

R.I. GEN. LAWS § 16-24-13 (1988): Classes for retarded and handicapped children in state residential facilities and institutions.

Classes for **retarded** children and children with other handicaps as described in the regulations of the state board of

regents for elementary and secondary education shall be provided for those children in **all the state institutions or state schools for the mentally retarded, and also in state operated and state supported facilities where retarded or handicapped children reside subject to all regulations of the state board of regents for elementary and secondary education.**

Travel

R.I. GEN. LAWS § 40.1-22-19 (1998): Aliens and non-residents.

. . .

(a) The director shall be responsible for the investigation and examination of all alien and nonresident persons who are **developmentally disabled** in any facility under the jurisdiction of the department of health, department of human services or elsewhere if admitted pursuant to the provisions of this chapter, and to **attend the deportation or removal of such persons to their respective countries or places of residence**.

(b) The director may make reciprocal agreements with other states or political subdivisions thereof to provide for prompt humane return under proper supervision of developmentally disabled residents of other states or political subdivisions thereof.

(c) In the case of nonresidents the director shall cause them to be removed to the state of their residence, except that he or she may defer the action where the removal would cause the developmentally disabled person undue hardship unless the interests of the state and other clients would be materially harmed by the deferment.

Voting

R.I. CONST. art. II, § 4 (1842):

. . .

and no pauper, **lunatic, person *non compos mentis*, person under guardianship**, or member of the Narragansett tribe of Indians, **shall be permitted to be registered or to vote**.

R.I. CONST. art. II, § 1 (1987): Persons entitled to vote.

. . .

Except that no person who has been lawfully adjudicated to be **non compos mentis** shall be permitted to vote.

SOUTH CAROLINA

Institutionalization

1918 S.C. Acts 729, No. 398: AN ACT to Establish the State Training School for the Feeble-minded, and to Provide for Its Government and Maintenance.

Be it enacted by the General Assembly of the State of South Carolina, That there shall be, and is hereby, established under the provisions of this Act, an institution to be known as the "**State Training School for the Feeble-minded.**"

. . .

Section 10. Definition of Term "Feeble-minded." For the purpose of this Act, the term "feeble-minded persons" shall be construed to mean any **moron, imbecile or idiotic person, of whatever grade**, who is **afflicted with mental defectiveness** from birth or from an early age, so pronounced that he is **incapable of competing on equal terms with his normal fellows or of managing himself or his affairs with ordinary prudence, and who, therefore, requires custodial care and training for his own protection and for the welfare of others and of the Community**, but who is not insane or of unsound mind in such a degree as to require his commitment to the State Hospital for the Insane.

. . .

Section 13. Petition for Commitment. When any person who is a resident of this State shall be adjudged to be feeble-minded, and by reason of such mental condition of feeble-mindedness and of social conditions, such as want of proper supervisions, control, care and support, or other causes, it is **unsafe and dangerous to the welfare of the**

community for him to be at large without supervisions, control and care, any relative, guardian or **any reputable citizen** of this State may file with the Judge of the Probate Court, or with the Clerk of the Circuit Court, a petition in writing, setting forth that the person therein named is feeble-minded, the facts and circumstances of the social conditions, such as want of proper supervision, control, care and support, or other causes, making it **unsafe or dangerous to the welfare of the community for such person to be at large** without supervision, control or care; also the name and residence, or that such name and residence is unknown to the petitioner, of some person, if any there be, actually supervising, caring for or supporting such person, and of at least one person, if any there be, legally chargeable with such supervision, care or support, and also the names and residences, if the same be known, of the parents or guardians.

. . .

S.C. CODE ANN. § 20-7-2327 (Law. Co-op. 1976): Authority of Children's Bureau to place children in private homes or institutions.

The Children's Bureau may place in private homes for adoption any destitute, delinquent, neglected, and dependent child committed to the care of the Children's Bureau. **Defective and otherwise handicapped children committed to the care of the Children's Bureau must be placed in institutions provided by the State for the care of these children, as may appear advisable for the best interests of the child.**

Managing Own Affairs

S.C. CODE ANN. § 43-25-50 (Law. Co-op. 1976): Eye examinations and medical and surgical treatment for visually handicapped persons; reports of results.

The Commission may arrange for the examination of the eyes of visually handicapped persons and may secure and pay for medical and surgical treatment for such persons whenever in the judgment of an ophthalmologist the eyes of such person may be benefited thereby. Whenever, upon examination by an ophthalmologist any person is found to have no vision or vision with glasses which is also defective as to prevent the performance of ordinary activities for which eyesight is essential, such examining ophthalmologist shall, within thirty days, report the results of the examination to the Commission.

Public Services

S.C. CODE ANN. § 43-33-530 (Law. Co-op. 1976): Discrimination prohibited without reasonable justification.

No person may discriminate against a handicapped person with respect to employment, public accommodations, public services, or housing **without reasonable justification.** No protections or right of access provided by law for handicapped persons are reduced or eliminated by the provisions of this section.

Sterilization

S.C. CODE ANN. § 5009 (1942): Sterilize certain inmates of penal or charitable institutions.

(1) ...Whenever the superintendent, or any other person or persons in charge of any penal or charitable institution of this State shall be of the opinion that it is for the best interest of the inmates of the institution of which he is superintendent, or person in charge, that **any inmate of such institution who is afflicted with any hereditary form of insanity that is recurrent, idiocy, imbecility, feeble-**

minded or epilepsy should be sexually sterilized, such superintendent, or other person in charge, shall present to the executive committee of the state board of health, of this State, a written petition stating the facts of the case, and the grounds of his opinion verified by his affidavit to the best of his knowledge and belief, and praying that an order may be entered by the said committee authorizing him to perform or have performed by some competent physician, or surgeon to be designated by him in his petition, or by the committee in its order, upon such inmate named in such petition, at one of the institutions of the State, the operation of **vasectomy**, if upon a male, and of **salpingectomy**, if upon a female, or such other safe and proper operation as medical science may provide to accomplish such purpose.

. . .

Voting

S.C. CONST. art. II, § 7 (1976): Disqualifications by reason of mental incompetence or conviction of crime.

The General Assembly shall establish disqualifications for voting by reason of **mental incompetence** or conviction of serious crime and may provide for the removal of such disqualifications.

S.C. CODE ANN. § 7-7-990 (Law. Co-op 1990): Barrier-free polling places for physically handicapped electors; criteria and procedures for use.

A. Notwithstanding any other provision of law, the county election commission in each county of the State is encouraged to make every polling place barrier free and shall provide at least **one polling place**, free of architectural barriers, which shall be known as the Countywide Barrier-Free Voting Precinct, **for use by physically handicapped**

electors of the county. Such polling place may be within any existing polling place that now is barrier-free or that is made barrier-free. Any physically handicapped elector, regardless of his place of residence in the county, may vote in this polling place if he meets the following criteria:

. . .

(2) Elector has applied in writing to and obtained from the county board of registration **thirty days prior to the election** a voting registration transfer authorizing the elector to vote at the county barrier-free polling place.

SOUTH DAKOTA

Institutionalization

1921 S.D. Laws 344, ch. 235:

Be It Enacted by the Legislature of the State of South Dakota:

Section 1. **The state commission for the control of the feeble minded is hereby created.** It shall consist of the Superintendent of the State School and Home for Feeble Minded, and one physician, one psychologist, one sociologist and one lawyer to be appointed by the governor. . . .

Section 2. It is the purpose of this act to provide that all **feeble minded persons** resident within this state shall become the wards of the state and shall be kept **segregated** to the end that **they shall not reproduce their kind**.

. . .

Section 4. The county board of insanity in each county shall constitute the county commission under this act and all laws now in force relating to the apprehension, examination, commitment, transportation and custody of the **insane** are hereby extended to the apprehension, examination, commitment to the State School and Home for Feeble Minded, transportation of such **feeble minded persons** and their care and control, provided, that no person shall be committed to the State School and Home for Feeble Minded against his wishes or the wishes of his or her parents or guardian, if there be any such within the State, unless said **County Commission shall find that such person is capable of procreation and likely to procreate unless so committed, or shall find that such person is a menace and**

detriment to the community. Nothing herein, however, shall prevent parents and guardians from voluntarily placing their **feeble minded children** or wards in the said State School and Home for Feeble Minded.

Managing Own Affairs

S.D. CODIFIED LAWS § 58-33-12.1 (Michie 1990): Blindness as basis for life insurance termination, modification or refusal – Unfair practice.

It is an unfair or discriminatory practice for an insurance company to terminate, or to modify coverage or to refuse to issue or refuse to renew any life policy or contract of life insurance solely because the applicant or insured or any employee of either is **blind** or partially **blind. This section does not apply to accident and health insurance. This section may not be interpreted to prohibit the termination, modification, issuance or renewal of any insurance policy or contract if the action is based on sound actuarial principles or is related to actual or reasonable anticipated experience.**

S.D. CODIFIED LAWS § 28-10-9 (Michie 1990): Register of the visually impaired maintained by director – Information included:

In carrying out his duties under this chapter, the director of service to the **blind** and visually impaired shall cause to be compiled and maintained a **complete register of the blind and visually impaired in the state**, which shall describe their capacity for education and training and their employment possibilities together with such other further information as the director shall deem of value.

S.D. CODIFIED LAWS § 20-11A-3 (Michie 2000): Disability after adjudication of incapacity -- Testamentary power on actual restoration to capacity.

After his incapacity has been judicially determined, a person of **unsound mind** can make no conveyance or other **contract,** nor delegate any power, nor waive any right, until his restoration to capacity is judicially determined. If actually restored to capacity, he may take a will, though his restoration is not thus determined.

Sterilization

1917 S.D. Sess. Laws 378, ch. 236, § 2:

[Making it "**the duty**" of State Board of Charities and Corrections to order **sterilization** of institutional inmates who "**would produce children with a tendency to disease, feeble-mindedness, idiocy or imbecility**."]

1931 S.D. Sess. Laws 200, ch. 153:

[Authorizing sterilization of the "**feeble-minded**," defined as "all individuals, except the insane, who by reason of mental deficiency are incapable of doing the work of the grades in the public schools in a reasonable ratio to their years of life; or who by reason of mental deficiency and other associated defects are incapable of making the proper adjustments to life for one of their chronological age."]

1935 S.D. Sess. Laws 163, ch. 113:

[Giving sub-commissions within each county "the power to make an order for the sterilization of any feeble-minded person found within its respective county. . . . " A petition could be filed with the chairman of the Sub-Commission of the County in which the alleged feeble-

minded person was found by "**any resident** of the County in which such person may be found."]

Voting

S.D. CONST. art. VII, § 2 (1974): Voter Qualification.

Every United States citizen eighteen years of age or older who has met all residency and registration requirements shall be entitled to vote in all elections and upon all questions submitted to the voters of the state unless **disqualified by law for mental incompetence** or the conviction of a felony. The Legislature may by law establish reasonable requirements to insure the integrity of the vote.

S.D. CONST. art. VII, § 2 (1978): Voter Qualification.

Every United States citizen eighteen years of age or older who has met all residency and registration requirements shall be entitled to vote in all elections and upon all questions submitted to the voters of the state unless disqualified by law for **mental incompetence** or the conviction of a felony.

TENNESSEE

Managing Own Affairs

TENN. CODE ANN. § 43-13-104 (1996): [Petition for appointment -- Sworn -- Contents].

The petition for the appointment of a conservator, which shall be sworn, should contain the following:

. . .

(8) The rights of the respondents to be removed from the respondent and transferred to the conservator. The rights the court may remove include, but are not limited to, the right to vote, dispose of property, execute instruments, make purchases, enter into contractual relationships, hold a valid Tennessee driver license, give or refuse consent to medical and mental examinations and treatment or hospitalization, or do any other act of legal significance the court deems necessary or advisable.

. . .

Marriage

TENN. CODE ANN. § 36-3-109 (1990): Issuance of license to drunks, insane persons or imbeciles forbidden.

No license shall be issued when it appears that the applicants or either of them is at the time drunk, **insane** or an **imbecile**.

Segregated Education

TENN. CODE ANN. § 49-6-3015 (1990): Blind Children.

. . .

(b) Compulsory school attendance is required of all blind children between the ages of seven (7) and sixteen (16) years, except;

(1) Blind children who are **mentally or physically defective** and **incapable of benefiting from school attendance**; and

. . .

(d) It is the duty of the local superintendent of schools to certify to the department of education blind students in their schools who are not in regular attendance or who are not capable of making satisfactory progress under the methods used for the sighted.

. . .

(2) Upon such certification, the judge may try such case and order the attendance of the child at the Tennessee School for the Blind during the regular term, summer vacation excepted, until the child has completed the course of study in the school or reached the age of sixteen (16) years.

. . .

(f) Blind children shall be subject to the truancy laws in the same manner as sighted children, and attendance officers shall enforce their attendance at school in the same manner as is provided for other children; provided, that the authorities of the Tennessee School for the Blind shall have power to reject any child sent to that institution who is

mentally or physically defective to the extent that he is unable to carry on the prescribed work of the school or to benefit from same, and to expel or send to his home any child who becomes unmanageable and incorrigible when he becomes a detriment to the welfare and progress of other students. Such action by the school authorities shall be reported within twenty (20) days to the juvenile judge of such child's home county.

TENN. CODE ANN. § 49-10-204 (1990): Special education centers.

(a)(1) A special education services association may establish and operate one or more special education centers to provide diagnostic, therapeutic, corrective and other services, on a more comprehensive, expert, economic and efficient basis than can reasonably be provided by a single school district.

(2) Such services may be provided in the regular schools by personnel and equipment of a center or, whenever it is **impractical or inefficient to provide them on the premises of a regular school, the center may provide services in its own facilities.**

TEXAS

Institutionalization

1915 Tex. Gen. Laws ch. 90 §§ 1, 2:

Be it enacted by the Legislature of the State of Texas

Section 1. There is hereby established at some suitable place in the vicinity of Austin, where suitable farm lands may be secured, a farm colony on the cottage plan for the training and custodial care of the **feeble minded** of the State, to be known as the State Colony for the Feeble Minded.

Section 2. It shall be the purpose of this colony to educate by such special methods as the best modern science has discovered the feeble minded children of the State that are capable of being educated, and to provide suitable work and supervision for the adult feeble minded who are not able to protect and support themselves at large as law abiding citizens, **to the end that these unfortunates may be prevented from reproducing their kind and society relieved of the heavy economic and moral losses arising from the existence at large of these unfortunate persons.**

Managing Own Affairs

TEX. INS. CODE ANN. § 21.21-3 (West 1990): Discrimination Against Handicapped Prohibited.

An insurer who delivers or issues for delivery or renews any insurance in this state may not refuse to insure, refuse to continue to insure, limit the amount, extent, or kind of coverage available to an individual, or charge an individual a different rate for the same coverage solely

because of handicap or partial handicap, **except where the refusal, limitation, or rate differential is based on sound actuarial principles or is related to actual or reasonably anticipated experience.**

Segregated Education

TEX. EDUC. CODE ANN. § 26.11 (West 1990): Purpose.

Rehabilitation districts may be created to provide education, training, special services, and guidance to handicapped persons or handicapped scholastics peculiar to their condition and needs, to develop their full capacity for usefulness to themselves and society, and to prevent them from becoming or remaining, in whole or in part, dependent on public or private welfare or charity.

TEX. CODE ANN. § 3260 (West 1990): Hospital established.

There is hereby established a **State Hospital for Crippled and Deformed Children.** The gift to the State of Texas by the Texas Public Health Association of the Walter Colquitt Memorial Children's Hospital, also known as the children's ward of the John Sealy Hospital on the premises of the University of Texas at Galveston, Texas, as hereby accepted by the State, and this hospital shall be the State Hospital for Crippled and Deformed Children. The term **"crippled and deformed children"** as used herein shall include children suffering from disease from which they may become crippled or deformed.

Voting

TEX. CONST. art. VI, § 1 (1990): Classes of persons not allowed to vote.

The following classes of persons shall not be allowed to vote in this State, to wit:

. . .

Second: **Idiots** and **lunatics**.

TEX. CONST. art. VI, § 1 (1999). Classes of persons not allowed to vote.

. . .

Second: All persons who have been determined **mentally incompetent** by a court, subject to such exceptions as the Legislature may make.

UTAH

Employment

UTAH CODE ANN. § 34-40-104 (1990): Exemptions.

. . .

(2) Handicapped individual whose earnings or productive capacities are impaired by age, **physical or mental deficiencies**, or injury may be **employed at wages which are lower than the minimum wage**, provided the wage is related to the employee's productivity. The commission may establish and regulate the wages paid or wage scales for such individuals.

Housing Discrimination

UTAH CODE ANN. § 10-9-2.6 (1990): Residential facilities for elderly persons.

(2) (a) Each municipality shall adopt ordinances which establish that a residential facility for elderly persons is a permitted use in any area where residential dwellings are allowed, except an area zoned to permit exclusively single-family dwellings. The ordinances shall establish a permit process which may require only that:

. . .

(iv) No residential facility for elderly persons be established within tree-quarters mile of another residential facility for elderly persons or residential facility for **handicapped persons**, as defined by Section 10-9-2.5;

. . .

(b) A municipality may, by ordinance, provide that no residential facility for elderly persons be established within **three-quarters mile** of another existing residential facility for elderly persons or residential facility for **handicapped** persons, as defined by Section 10-9-2.5.

Institutionalization

1920 Utah Laws 102, ch. 75 § 1:

Be it enacted by the Legislature of the State of Utah:

That a school for **feeble-minded persons**, to be known as "Utah State Training School" is hereby authorized to be located and established in the manner hereinafter provided.

1929 Utah Laws 105, ch. 75 § 9: Department for instruction-custodial department for persons over school age-instruction and training.

The said board of trustees are hereby empowered and shall maintain a school department for the instruction and training of **feeble-minded persons** who are within the school age or who are capable of being benefited by school instruction, and a custodial department for the care and custody of **feeble-minded persons beyond the school age or not capable of being benefited by school instruction,** and shall cause to be given to patients thereof instruction and training in unskilled labor and trades and such arts, crafts, manual training, kindergarten and other branches and lines of occupation as may be appropriate for the patients to undertake.

Sterilization

1929 Utah Laws 102, ch. 75:

[Authorizing sterilization of "persons . . . whose defects prevent them from properly taking care of themselves or who are a **social menace**."]

Travel

UTAH CODE ANN. § 17-5-59 (1990): Transient indigents and insane.

. . .

They may adopt such rules and regulations, by resolution, as may be necessary to regulate or prohibit the leaving by any person or common carrier within the limits of the county of any indigent, **idiotic** or **insane** persons not having a lawful settlement in such county, or the leaving of the bodies of any such persons who may have died while traveling, unless such person or common carrier shall undertake to be responsible for the proper burial of such bodies or unless such deceased person at the time of his death had a lawful settlement in the county within which it is proposed to deliver his body.

Voting

UTAH CONST. art. IV, § 6 (1895): Elections and Right of Suffrage.

No **idiot**, **insane person**, or person convicted of treason or crime against the elective franchise, unless restored to civil rights, shall be permitted to vote at any election or be eligible to hold office in this State.

UTAH CONST. art. IV, § 3 (1991): Mentally incompetent persons and certain criminals ineligible to vote.

No **mentally incompetent** person or person convicted of treason, or crime against the elective franchise, unless restored to civil rights, shall be permitted to vote at any election, or be eligible to hold office in this State.

VERMONT

Access to Public Buildings

VT. STAT. ANN. tit. 21, § 273 (1990): Construction standards; variance.

. . .

(b) The architectural barrier compliance board shall exempt a public building, unit or historic building, or portions thereof, from any of the standards established by this section if the board determines that:

(1) the public building, unit or historic building **would not normally be used by handicapped persons;**

(2) compliance with specific standards would be prohibitively costly in relation to the normal costs of the total project;

(3) compliance with specific standards would cause an undue adverse effect to the distinctive design characteristics of an historic building;

(4) protracted or permanent abandonment of a nonpublic building or public building would result from the failure of the board to grant an exemption under this section;

(5) cost overruns for the alteration of a public building or change in use of a nonpublic building to become a public building resulted in a cost in excess of the 40 percent of the fair market value of the building or unit and that the overrun was not reasonably foreseeable at the time the parties entered into the contract for the project; or

(6) exemptions in subdivisions (1) and (2) of this subsection shall not apply to newly constructed covered multifamily dwellings built for first occupancy after January 1, 1990, unless it is impractical to design and construct at least one building entrance on an accessible route, as defined by the appropriate requirements of ANSI 117.1, because of the terrain or unusual characteristics of the site. The burden of proving such impracticality is on the person or persons who designed or constructed the covered multifamily dwelling.

Housing Discrimination

VT. STAT. ANN. tit. 24, § 4409 (2000): Limitations.

. . .

(d) A state licensed or registered residential care home or group home, serving **not more than six persons** who are **developmentally disabled** or **physically handicapped**, shall be considered by right to constitute a permitted single-family residential use of property, except that no such home shall be so considered if it locates within **1,000 feet** of another such home.

. . .

Employment

VT. STAT. ANN. tit. 21, § 385: Administration.

. . .

(4) To appoint with the approval of the governor a wage board with authority:

. . .

(B) to recommend a suitable scale of rates for learners, apprentices and **handicapped persons**, which **may be less than the regular minimum wage rate for experienced and non-handicapped workers.**

Institutionalization

1913 Vt. Acts & Resolves 96, No. 81 § 1: AN ACT To Provide For The Care Training And Education Of Feeble-Minded Children.

A state school which shall be called the **Vermont State School for Feeble-minded Children** is hereby created and established for the care, training and education of **idiotic** and **feeble-minded** children, otherwise called **mentally defective children**, between five and twenty-one years of age. All such children in the Vermont industrial school who, in the judgment of the selectmen or the board of penal institutions, are capable of being benefited by the instruction given in said school for feeble-minded children, shall be committed thereto.

Marriage

VT. STAT. ANN. tit. 15, § 514 (1990): Party an idiot or lunatic.

(a) When a marriage is sought to be annulled on the ground of the **idiocy** of one of the parties, it may be declared void on the complaint of a relative of such **idiot** at any time during the life of either of the parties.

(b) When a marriage is sought to be annulled on the ground of the **lunacy** of one of the parties, on the complaint of a relative of the **lunatic**, such marriage may be declared void during the continuance of such lunacy, or after the death

of the lunatic in that condition and during the lifetime of the other party to the marriage.

(c) The marriage of a **lunatic** may be declared void upon the complaint of a **lunatic** after restoration to reason, but a decree of nullity shall not be pronounced if the parties freely cohabited as husband and wife after the **lunatic** was restored to sound mind.

(d) If an action is not prosecuted by a relative, the marriage of an **idiot** or a **lunatic** may be annulled during the lifetime of both the parties to the marriage, on the complaint of a person admitted by the court to prosecute as the next friend of such **idiot** or **lunatic**.

(e) The word "lunatic" as used in sections 511-514 of this title shall extend to **persons of unsound mind other than idiots**.

VT. STAT. ANN. tit. 15, § 512 (1990): Voidable marriages – Grounds for annulment generally.

The marriage contract may be annulled when, at the time of marriage, either party had not attained the age of sixteen years or was an **idiot** or **lunatic** or **physically incapable** of entering into the marriage state or when the consent of either party was obtained by force or fraud.

Sterilization

VT. STAT. ch. 427 § 10,027 (1947): Construction.

It shall be the policy of the state to **prevent procreation of mentally defective and insane persons**, when the public welfare and the welfare of such persons likely to procreate, can be improved by **voluntary sterilization** as provided in this chapter.

. . .

When two physicians and surgeons legally qualified to practice in the state examine a person resident of the state, and decide:

I. That such person is **mentally defective or insane and likely to procreate mentally defective or insane persons if not sexually sterilized;**

II. That the health and physical condition of such person will not be injured by the operation of vasectomy, if a male, or the operation of salpingectomy, if a female;

III. That the **welfare of such person and the public welfare will be improved if such person is sterilized as aforesaid**.

. . .

Voting

VT. STAT. ANN. tit. 17, § 2667 (1990): Access to annual meeting.

The legislative body of the municipality shall take reasonable measures to assure that elderly or handicapped voters may conveniently attend annual or special meetings; provided, **however, that such measures need not be taken if doing so would impose undue hardship on the town.** Measures may include, but are not limited to, location of meetings on the ground floor of buildings or providing ramps or other devices for access to meetings.

VIRGINIA

Institutionalization

1916 Va. Acts ch. 388: AN ACT to define feeble-mindedness and to provide for the examination, legal commitment, and the custody and care of feeble-minded persons, and their **segregation** in institutions.

1. Be it enacted by the general assembly of Virginia, That the words **"feeble-minded person"** in this act shall be construed to mean any person with **mental defectiveness** from birth or from an early age, but **not a congenital idiot,** so pronounced that he is incapable of caring for himself or managing his affairs, or of being taught to do so, and is unsafe and dangerous to himself and to others and to the community, and who, consequently, requires care, supervision and control for the protection and welfare of himself, of others and of the community, but who is not classible as an "insane person," as usually interpreted.

2. No **feeble-minded person** shall be sent to any institution, except as hereinafter provided. When any person residing in this State shall be supposed to be feeble-minded, **any reputable citizen** of the State may file a petition in the circuit court of the county, or corporation court of the city, or with the judge thereof in vacation, or before any justice in the city or county in which such alleged feeble-minded person is found, setting forth under oath the circumstances indicating the feeble-mindedness of the person named, the facts of his condition and surroundings, his financial condition, and the names and financial condition of the persons, if any, having the custody or control, and the parents, guardians and brothers and sisters, if any, of the alleged feeble-minded person.

3. Thereupon, it shall be the duty of the judge or the justice with whom said petition is filed, to issue a warrant ordering such alleged feeble-minded person to be brought before him and summon the persons named in the petition and such other persons as may be deemed competent to testify to the condition and circumstances of the alleged feeble-minded person, including two physicians, and enter or issue an order fixing a time and place for the examination of such feeble-minded person. The judge or the justice and the two physicians, one of whom shall, when practicable, be the family physician, and neither shall in any manner be related to him or have an interest in his estate, shall constitute a commission to determine whether or not such person is feeble-minded as alleged; and if it be found by such commission that such person is feeble-minded, and is not under such proper supervision, care or control as to insure the welfare of himself, of others, or of the community, the commission shall file with the circuit or corporation court of the county or city in which such commission is held, a report in writing, setting forth the results of their examination, together with their conclusions and recommendations.

4. If the commission be satisfied that such person is not feeble-minded, he shall be discharged and the petition dismissed. If the commission be satisfied that such person is feeble-minded, said commission may petition the circuit or corporation court of the county or city in which said commission is held, or the judge thereof in vacation, and said court or judge may appoint some suitable person to be the guardian or committee of the person of such feeble-minded person, and said court or judge may also appoint the same or a different person guardian or committee of the property of the feeble-minded person, and such guardian or guardians shall have the rights and duties which pertain to guardians of the person and property of infants under the laws of this State, and shall give such bond as may be required by said judge; provided, that the said court or judge may **commit**

such feeble-minded person to a private institution approved by the State board of charities and corrections, or to a **State institution** or **colony for the feeble-minded**. And said court or judge may commit said feeble-minded person to the custody of the superintendent of the poor of the county or city in which said commission is held, pending admission into the institution or colony.

. . .

Managing Own Affairs

VA. CODE ANN. § 54.1-2968 (Michie 1990): Information about certain handicapped persons.

This chapter shall not be construed to prohibit any duly licensed physician from **communicating the identity of any person under age twenty-two who has a physical or mental handicapping condition to appropriate agencies of the Commonwealth** or any of its political subdivisions and other information regarding such person or condition which may be helpful to the agency in the planning or conduct of services for handicapped persons.

Sterilization

VA. CODE ANN. § 54.1-2975 (1998): Sterilization operations for certain children incapable of informed consent.

It shall be lawful for any physician licensed by the Board of Medicine to perform a vasectomy, salpingectomy, or other surgical **sexual sterilization** procedure on a person fourteen years of age or older and less than eighteen years of age when

. . .

4. The court has determined by clear and convincing evidence that the child's **mental abilities are so impaired** that the child is incapable of making his or her own decision about sterilization and is unlikely to develop mentally to a sufficient degree to make an informed judgment about sterilization in the foreseeable future.

. . .

VA. CODE ANN. § 54.1-2976 (1998): Sterilization operations for certain adults incapable of informed consent.

It shall be lawful for any physician licensed by the Board of Medicine to perform a **vasectomy, salpingectomy**, or other surgical **sexual sterilization** procedure on a person eighteen years of age or older, who does not have the capacity to give informed consent to such an operation, when:

1. A petition has been filed in the circuit court of the country or city wherein the person resides by the person's parent or parents, guardian, spouse, or next friend requesting that the operation be performed;

2. The court has made the person a party defendant, served the person, the person's guardian, if any, the person's spouse, if any, and if there is no spouse, the person's parent with notice of the proceedings and appointed for the person an attorney-at-law to represent and protect the person's interests;

3. The court has determined that a full, reasonable, and comprehensible medical explanation as to the meaning, consequences, and risks of the sterilization operation to be performed and as to alternative methods of contraception has been given by the physician to the person upon whom the operation is to be performed, to the person's guardian, if any,

to the person's spouse, if any, and, if there is no spouse, to the parent;

4. The court has determined (i) that the person has been legally adjudged to be incapacitated in accordance with Article 1.1 (§ 37.1-134.6 et seq.) of Chapter 4 of Title 37.1 and (ii) that the person is **unlikely to develop mentally** to a sufficient degree to make an informed judgment about sterilization in the foreseeable future;

5. The court, to the greatest extent possible, has elicited and taken into account the views of the person concerning the sterilization, giving the views of the person such weight in its decision as the court deems appropriate;

6. The court has complied with the requirements of § 54.1-2977; and

7. The court has entered an order authorizing a qualified physician to perform the operation not earlier than thirty days after the date of the entry of the order, and thirty days have elapsed, the court order shall state the date on and after which the sterilization operation may be performed.

VA. CODE ANN. § 54.1-2977 (1998): Standards for court-authorized sterilization of certain persons.

In order for the circuit court to authorize the sterilization of a person in accordance with § 54.1-2975 or § 54.1-2976, it must be proven by clear and convincing evidence that:

1. There is a need for contraception. The court shall find that the person is engaging in sexual activity at the present time or is likely to engage in sexual activity in the near future and that pregnancy would not usually be intended by such person if such person were competent and engaging in sexual activity under similar circumstances;

2. There is no reasonable alternative method of contraception to sterilization;

3. The proposed method of sterilization conforms with standard medical practice, and the treatment can be carried out without unreasonable risk to the life and health of the person; and

4. The nature and extent of the person's **mental disability** renders the person permanently incapable of caring for and raising a child. The court shall base this finding on empirical evidence and not solely on standardized tests.

B. The criteria set out in subsection A of this section shall be established for the court by independent evidence based on a medical, social, and psychological evaluation of the person upon whom the sterilization operation is to be performed.

Voting

VA. CONST. art. III, § 1 (1864):

No person shall have the right to vote who is of **unsound mind** or a pauper, or who has been convicted of bribery in an election, or of any infamous offence.

VA. CONST. art. I, § 23 (1928):

The following persons shall be excluded from registering and voting: **idiots, insane persons**.

VA. CONST. art. II, § 1 (1999):

As prescribed by law, no person adjudicated to be **mentally incompetent** shall be qualified to vote until his competency has been reestablished.

WASHINGTON

Institutionalization

1905 Wash. Laws 133, ch. 70:

Section 1. That a State institution hereby is established to be known as "The State Institution for Feeble-minded," for the care and education of **the defective and feeble-minded youth** of the State of Washington.

. . .

Section 4. Every child and youth residing within this State, under the age of twenty-one years who by reason of **defective intellect** are rendered **unable to acquire an education in the common schools,** and **epileptics** of the same age, are entitled to receive such physical and mental training and care as is provided in said institution, at the expense of the State. The term "feeble-minded," as used in connection with this institution, shall be so construed as to include **idiotic children,** and the said board shall provide a custodian or asylum department for the care of such as can not be benefited by educational training. The said board is hereby authorized and required to utilize the labor of the inmates of the said institution as far as may be conducive to their health and best interests, under the direction of the superintendent of the said institution, subject to the approval of the said board.

. . .

Section 6. That upon the completion and equipment of said building or buildings herein provided for, or a sufficient portion thereof for their accommodation, that said State Board of Control shall remove or cause to be removed

to said "State Institution for Feeble-minded" all of the inmates then in the feeble-minded department of the State School for Defective Youth.

. . .

Section 9. **It shall be the duty of the parents or guardians of such defective youth to send them to the said institution for feeble-minded**. The county superintendent shall take all action necessary to endorse this section. *Provided,* That if satisfactory evidence shall be laid before the county superintendent that any defective youth is being properly educated and cared for at home or in some suitable institution other than the state institution for feeble-minded, the county superintendent shall take no action in such case further than to make a record of such fact, and take such steps as shall be necessary to satisfy himself that said defective youth shall continue to receive proper education and care. Any parent, guardian, school superintendent or county commission who shall, without proper cause, fail to carry into effect the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof, upon the complaint of any officer or citizen of the county or state, before any justice of the peace or superior court, shall be fined in any sum not less than fifty nor more than two hundred dollars, in the discretion of the court.

Segregated Education

WASH. REV. CODE ANN. § 28A.13.060 (West 1990): Appeal from superintendent's denial of educational program.

Where a handicapped child as defined in RCW 28A.13.010 has been **denied the opportunity of an education program** by a local school district superintendent under the provisions of RCW 28A.27.010, or for any other reason there shall be an affirmative showing by the school

district superintendent in writing directed to the parents or guardian of such a child within ten days of such decision that:

(1) No agency or other school district with whom the district may contract under RCW 28A.13.030 can accommodate such child, and

(2) Such child will not benefit from an alternative educational opportunity as permitted under RCW 28A.13.040."

Sterilization

1921 Wash. Sess. Laws 162, Ch. 53:

[Authorizing the compulsory sterilization of the feeble-minded, insane, epileptic, habitual criminals, moral degenerates and sexual perverts.]

Voting

WASH. CONST. art. VI, § 3 (1988): Who Disqualified.

All **idiots**, **insane persons**, and persons convicted of infamous crime unless restored to their civil rights are excluded from the elective franchise.

WASH. REV. CODE ANN. § 29.57.010 (West 1990): Intent—Recommendation to county auditors.

The intent of this chapter is to implement Public Law 98-435 which requires state and local election officials, **whenever possible**, to designate and use polling places in federal elections and permanent registration locations which are accessible to elderly and handicapped persons.

WASH. CONST. art. VI, § 3 (2000): Who Disqualified.

All persons convicted of infamous crime unless restored to their civil rights and all persons while they are judicially declared **mentally incompetent** are excluded from the elective franchise.

WEST VIRGINIA

Institutionalization

1921 W. Va. Acts 479:

Be it enacted by the Legislature of West Virginia:

There is hereby established for the treatment and training of **mental defectives** a state institution to be known as the "West Virginia Training School." It shall belong to that class of institutions mentioned in section three, chapter fifteen of the code, and shall be managed and controlled as provided in said chapter, all the provisions whereof shall be applicable to said school except as in this act provided. The chief executive officer thereof shall be a superintendent, who shall be a legally qualified physician, scientifically trained in mental medicine and of not less than five years' experience in the treatment and care of **insane persons** and **mental defectives,** and who shall be appointed by the governor with the advice and consent of the senate.

There shall be admitted to said school any person with **mental defectiveness** from birth or an early age, so pronounced that he or she is unable to care for himself or herself and manage his or her affairs with ordinary prudence, and **who because of mental defect is a menace to the happiness and welfare of himself or herself or of others in the community,** and therefore requires care, training or control for the protection of himself or herself or of others, and yet who is not insane. This type of persons, commonly classed as **feeble-minded,** including **idiots, imbeciles** and **morons,** shall be known and designated as **mental defectives** for the purposes of this act. Should the school at any time not be able to accommodate all persons of such class offered

for admission, **preference in admission shall be given to children and women of child-bearing age.**

Marriage

W. VA. CODE § 48-2-2 (1990): For what and when marriages void; affirmation of annulment of marriage.

(a) The following marriages **are voidable and shall be void** from the time they are so declared by a judgment order of nullity:

. . .

(3) Marriages solemnized when either of the parties:

(A) Was an **insane person, idiot** or **imbecile;**

. . .

Segregated Education

W. VA. CODE § 18-8-10 (1990): Compulsory education of deaf and blind; offenses; penalties; names of deaf and blind.

Every parent, guardian or other person having control of any mentally normal minor over six years of age, who is **defective in sight or hearing to the extent that he cannot be benefited by instruction in the public schools, shall be required to send such minor to the West Virginia schools for the deaf and the blind at Romney.** Such minor shall continue to attend such schools for a term of at least thirty-six weeks each year until he has completed the course of instruction prescribed for such schools by the state board of education, or has been discharged by the superintendent of said school.

Any such **deaf** or **blind** minor shall be exempt from attendance at said schools for any of the following reasons: (a) Instruction by a private tutor or in another school approved by the state board of education for a time equal to that required by the first paragraph of this section; (b) **physical incapacity for school work**; (c) any other reason deemed good and sufficient by the superintendent of such schools, with the approval of the state board of education.

Voting

W. VA. CONST. art. IV, § 1 (1999): Elections and Officers.

The citizens of the state shall be entitled to vote at all elections held within the counties in which they respectively reside; but no person who is a minor, or who has been declared **mentally incompetent** by a court of competent jurisdiction, or who is under conviction of treason, felony or bribery in an election, or who has not been a resident of the state and of the county in which he offers to vote, for thirty days next preceding such offer, shall be permitted to vote while such disability continues . . . .

WISCONSIN

Housing Discrimination

WIS. STAT. § 60.63 (1999): Community and other living arrangements.

For purposes of s. 60.61, the location of a community living arrangement, as defined in s. 46.03 (22), a foster home, as defined in s. 48.02 (6), a treatment foster home, as defined in s. 48.02 (17q), or an adult family home, as defined in s. 50.01 (1), in any town shall be subject to the following criteria:

(1) **No community living arrangement may be established after March 28, 1978 within 2,500 feet, or any lesser distance established by an ordinance of the town, of any other such facility.** Agents of a facility may apply for an exception to this requirement, and such exceptions may be granted at the discretion of the local town. Two community living arrangement may be adjacent if the town authorizes that arrangement and if both facilities comprise essential components of a single program.

(2) **Community living arrangements shall be permitted in each town without restriction as to the number of facilities, so long as the total capacity of the community living arrangements does not exceed 25 or one percent of the towns population, whichever is greater.** If the capacity of the community living arrangements in the town reaches such total, **the town may prohibit additional community living arrangements from locating in the township.** Agents of a facility may apply for an exception to this requirement, and such exceptions may be granted at the discretion of the town.

. . .

(5) In all cases where the community living arrangement has capacity for **9 to 15 persons** being served by the program, meets the criteria listed in subs. (1) and (2), and is licensed, operated or permitted under the authority of the department of health and family services, that facility **is entitled to locate in any residential area except areas zoned exclusively for single-family or 2-family residences** except as provided in sub. (10), but is entitled to apply for special zoning permission to locate in those areas. The town may grant such special zoning permission at its discretion and shall make a procedure available to enable such facilities to request such permission.

(6) In all cases where the community living arrangement has capacity for serving **16 or more persons**, meets the criteria listed in subs. (1) and (2), and is licensed, operated or permitted under the authority of the department of health and family services, that facility is **entitled to apply for special zoning permission to locate in areas zoned for residential use.** The town may grant such special zoning permission at its discretion and shall make a procedure available to enable such facilities to request such permission.

. . .

(10) Not less than 11 months nor more than 13 months after the first licensure of an adult family home under s. 50.033 or of a community living arrangement and every year thereafter, the town board of a town in which a licensed adult family home or a community living arrangement is located **may make a determination as to the effect of the adult family home or community living arrangement on the health, safety or welfare of the residents of the town.** The determination shall be made according to the procedures

provided under sub. (11) **If the town board determines that the existence in the town of a licensed adult family home or a community living arrangement poses a threat to the health, safety or welfare of the residents of the town, the town board may order the adult family home or community living arrangement to cease operation** unless special zoning permission is obtained. The order is subject to judicial review under s. 68.13, except that a free copy of the transcript may not be provided to the licensed adult family home or community living arrangement. The licensed adult family home or community living arrangement must cease operation within 90 days after the date of the order, or the date of final judicial review of the order, or the date of the denial of special zoning permission, whichever is later.

. . .

Institutionalization

1895 Wis. Laws 240: AN ACT to establish a home for the custody, training and education of the **feeble-minded**, **epileptic** and **idiotic**, and to appropriate certain sums of money therein named.

There is hereby created and established for the care, custody and training of the **feeble-minded**, **epileptic** and **idiotic** of this state, an institution to be known as "The Wisconsin Home for Feeble-Minded."

. . .

Said home for the **feeble-minded** shall be organized into the following departments:

1. A school department for the **educable grades or classes.**

2. A custodial department for the **helpless and lower types**.

3. Such other departments, or **colonies**, as the needs of the institution may require.

1913 Wis. Laws 963, ch. 689 § 1:

. . .

There is hereby established a **new institution** to be located south of the center line of the state, and to be known as the **southern Wisconsin home for the feeble-minded and the epileptic**. The state board of control of Wisconsin is hereby authorized to purchase a suitable site for such home for the feeble-minded, such site not to exceed one thousand acres of land and to be suitable for the establishment of a home for the feeble-minded and the epileptic.

Whenever it shall appear that any **feeble-minded, epileptic or idiotic person is dangerous to be at large because of his or her vicious and demoralizing acts or tendencies**, or whenever it shall appear that any **feeble-minded** female of child-bearing age, is by reason of her condition, a **menace to society**, it shall be the duty of any supervisor of the town, city, village or ward in which such person may reside, to take measures to have such person brought before the county judge, pursuant to law.

. . .

Segregated Education

WISC. STAT. ANN. § 115.54 (West 1990): Compulsory education.

If it appears, by affidavit, to any circuit judge that any blind or deaf child between the ages of 6 and 21 is deprived of a suitable education by the failure of the person having the care and custody of the child to provide a suitable education, the judge shall order the person to bring the child before the judge. If the material allegations of the affidavit are denied, the judge shall subpoena witnesses and hear testimony. If the allegations are admitted or established, **the judge may order the child sent to the school for the visually handicapped or for the deaf or to some class or other school for instruction**, but the order shall not make a direct charge for the class or school against any county.

Sterilization

1913 Wis. Laws 971-72: AN ACT to create section 561jm of the statutes, relating to the prevention of criminality, insanity, feeble-mindedness and epilepsy.

There is added to the statutes a new section to read: Section 561jm. The state board of control is hereby authorized to appoint, from time to time, one surgeon and one alienist, of recognized ability, whose duty it shall be, in conjunction with the superintendents of the state and county institutions who have charge of criminal, **insane**, **feeble-minded** and **epileptic** persons, to examine into the mental and physical condition of such persons legally confined in such institutions.

If such experts and superintendent unanimously find that **procreation is inadvisable** it shall be lawful to perform such **operation for the prevention of procreation** as shall be decided safest and most effective; provided, however, that the operation shall not be performed except in such cases as are authorized by the said board of control.

Voting

WIS. CONST. art. III, § 2 (1986): Who not electors.

No person under guardianship, non compos mentis or insane shall be qualified to vote at any election; nor shall any person convicted of treason or felony be qualified to vote at any election unless restores to civil rights.

WIS. CONST. art III, § 2 (1999):

. . .

(4) Excluding from the right of suffrage persons:

. . .

(b) Adjudged by a court to be **incompetent or partially incompetent**, unless the judgment specifies that the person is capable of understanding the objective of the elective process or the judgment is set aside.

WYOMING

Access To Courts

WYO. STAT. ANN. § 1-11-101 (Michie 1999):

(a) A person is competent to act as juror if he is:

(i) An adult citizen of the United States who has been a resident of the state and of the county ninety (90) days before being selected and returned;

(ii) In possession of his natural faculties, of **ordinary intelligence and without mental or physical infirmity** preventing satisfactory jury service;

(iii) Possessed of sufficient knowledge of the English language.

(b) No citizen shall be excluded from service as a juror on account of race, color, religion, sex, age, national origin or economic status.

Institutionalization

1907 Wyo. Sess. Laws 188:

. . .

There shall be established in this State an institution for the custody, care, education, proper treatment and discipline of **feeble-minded** and **epileptic persons**, under the name and style of the "**Wyoming Home of the Feeble-Minded and Epileptic**."

. . .

The object of said institution shall be to provide by all proper and feasible means, and intellectual, moral and physical training of that **unfortunate portion of the community who have been born, or by disease, have become imbecile or feeble-minded or epileptic**, and by a judicious and well adapted course of training, management and treatment, to ameliorate their condition, and to develop as much as possible their intellectual faculties and physical health, and reclaim them from their **unhappy condition**, and **fit them as far as possible for future usefulness in society.**

1911 WYO. SESS. LAWS 167:

. . .

There shall be established in this state an institution for the custody, care, education, proper treatment, and discipline of **feeble minded** and **epileptic persons** under the name and style of the **Wyoming School for Defectives**.

1929 WYO. SESS. LAWS 155:

A person of any age, who has resided in the State of Wyoming continuously for one year immediately preceding the date of application, and who is either **feebleminded** or **epileptic**, may be admitted to the Training School without payment for maintenance treatment or training, unless such payment shall have been ordered by the committing court as hereinafter provided. **To be feebleminded in the sense of this Act, a person must be one who, because of inadequate mental development existing from birth or from an early age, cannot be properly cared for outside an institution, or must be a child of school age who, because of inadequate mental development, cannot be properly trained in a public school. The term "feebleminded" shall be construed to include also "imbecile" and "idiot.**

Segregated Education

WYO. STAT. ANN. § 21-2-502 (1977): Duties of school districts; interdistrict contracts; assistance of state board.

Each school district of this state having any school age children residing in the district who possess any of the **handicaps** covered under this article, shall, subject to the rules and regulations of the state board, provide for the appropriate diagnosis, evaluation, education or training, and necessary related services, and may include, but is not limited to room and board, for those children. If the school district is unable to provide the necessary and appropriate programs and services, it shall contract with another school district or agency to obtain them. **If the programs and services cannot reasonably be provided by the district or by interdistrict contracts, the state board shall assist local boards of trustees in arranging for the appropriate educational programs and services either within or without the state pursuant to its rules and regulations and financed as provided by law.**

Voting

WYO. CONST. art. VI, § 6 (1977): What persons excluded from franchise.

All **idiots**, **insane persons**, and persons convicted of infamous crimes, unless restored to civil rights, are excluded from the elective franchise.

WYO. CONST. art. VI, § 6 (1999): What persons excluded from franchise.

All persons adjudicated to be **mentally incompetent** or persons convicted of felonies, unless restored to civil rights, are excluded from the elective franchise.

CALIFORNIA

STATE PERSONNEL BOARD - PERCENTAGE OF DISABLED EMPLOYEES

1

BY CALENDAR YEAR FROM 1990 THRU 2000

12:30 Wednesday, June 7,

2000

	TOTAL	DISABLED		UNSPECIFIED
	EMPLOYEES	EMPLOYEES	PERCENT	EMPLOYEES
JAN 1				
1990	173,780	14,365	8.27	24,139
1991	182,306	15,238	8.36	22,170
1992	181,522	14,809	8.16	19,851
1993	183,071	14,261	7.79	19,030
1994	379,950	29,557	7.78	34,706
1996	381,871	28,245	7.40	32,015
1998	187,600	14,667	7.82	12,807
1999	193,650	14,724	7.60	12,437
2000	203,095	15,526	7.64	12,121

CIVIL SERVICE COMMISSION

SUSAN GRIMES MUNSELL, CHAIRPERSON
RAE LEE CHABOT
ROBERT P. HUNTER
JAMES P. PITZ

STATE OF MICHIGAN

JOHN ENGLER, Governor

DEPARTMENT OF CIVIL SERVICE

CAPITOL COMMONS CENTER
400 SOUTH PINE STREET, P.O. BOX 30002
LANSING, MICHIGAN 48909
www.state.mi.us/mdcs

JOHN F. LOPEZ, State Personnel Director

June 19, 2000

Ms Suzan Kern
7010 Miranda Dr.
Austin, TX 78752-3122

Dear Ms. Kern::

In response to your request for data on employees with disabilities, I have enclosed the following information:

	Item Title	Comment
1.	Civil Service Regulation 3.07, Twelve-Month Trial Appointment Process for Handicappers	The tabbed item is the form used for self-identification of an applicant or employee with a disability. This form has essentially remained the same since the program's inception. Although limited surveys had been conducted prior to 1984, it was that year that a comprehensive survey of the entire work force was undertaken to ask those with disabilities to come forward and identify themselves using a form quite similar to this. The results were entered into the personnel database and then used for data reporting. The Civil Service application form was modified to offer applicants the opportunity to self-identify. The enticement to self-identify was access to the expanded certification (later called augmented certification) program wherein eligibility for appointment consideration was expanded to lower bandwidths for underutilized protected group members when there were insufficient representation in the first band of names.
2.	Handicapper Guide to State Employment	This is a general brochure describing the Michigan Department of Civil Service's programs for applicants and employees with disabilities published in 1991.

3.	Annual Work Force Report, Fiscal Year 1986-87	This is the first mass publication of data on employees with disabilities subsequent to the 1984 survey.
4.	Twelfth Annual Work Force Report, Fiscal Year 1990-91	Similar data on employees with disabilities a few years later.
5.	Seventeenth Annual Work Force Report, Fiscal Year 1995-96	Similar data on employees with disabilities a few years later with a few additions.
6.	Latest Annual Work Force Report, Fiscal Year 1999-2000	Similar data on employees with disabilities a few years later with a few additions. This is at the printers right now and is not yet published.
7.	Civil Service Utilization Analysis Reporting System, Availability Analysis Report, Statewide Summary by Job Category, 1-91 through 9-99	This is the statewide roll-up of the classified workforce by race, sex, and handicap that also reports underutilization compared to an Availability Standard. This is provided to all appointing authorities and is available by FOIA, though it is not published. Various handicapper Availability Standards were used over the years (11.5% in 1977; 9.7% in 1985), but by the time we started saving these reports when I came on the job as the Civil Service State EEO Coordinator in 1990, we were using 4.4% handicapper Availability Standard for entry level jobs requiring no education or experience and varying Availability Standards for other jobs. The latter Availability Standards were based on both 4.4% external handicapper availability weighted 35% and internal employment list handicapper representation weighted 65% for the specific job. It looks to me as though the ratio of handicapper underutilization to the size of the work force has increased during these years. Before one makes the assumption that these numbers support a conclusion that discrimination (as distinguished from mere underutilization) has increased, one would have to know that the incentive for identifying as a person with a disability declined as the affirmative action program in general became increasingly controversial in the courts and the media, and consequently less supported by the

administration. In 1997 the augmented certification program was abolished and the entire affirmative action administrative program began to be dismantled.

Although these materials are rather voluminous, I hope some will be useful to you in your project. You may contact me at pollockm@state.mi.us or 517/373-2961 if you have questions about any of the materials.

Sincerely,

Mary I. Pollock
Employment Relations Board Appeals Officer
(Former State EEO Coordinator)

Enclosures as listed

TWELFTH ANNUAL WORK FORCE REPORT

FISCAL YEAR 1990-91

MAY 1992

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State of Michigan
Department of Civil Service
Management Services Division

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Table 4-7

AVERAGE AGE, PAY RATE, AND LONGEVITY ANALYSIS FOR HANDICAPPERS BY DEPARTMENT

DEPARTMENT	NUMBER OF EMPLOYEES	NUMBER OF HANDICAPPER EMPLOYEES	HANDICAPPER PERCENT OF ALL EMPLOYEES	HANDICAPPER AVERAGE AGE	HANDICAPPER AVERAGE HOURLY RATE	NUMBER OF HANDICAPPERS RECEIVING LONGEVITY	PERCENT OF HANDICAPPERS ELIGIBLE FOR LONGEVITY
Agriculture	580	37	6.6	46	17.86	30	81.1
Attorney General	490	25	5.1	50	23.98	20	80.0
Auditor General	154	11	7.1	43	25.40	11	100.0
Civil Rights	186	19	10.2	53	19.92	19	100.0
Civil Service	322	26	8.1	46	18.66	20	76.9
Commerce	2,193	145	6.6	45	17.01	128	88.3
Corrections	13,367	688	5.1	43	18.89	462	67.3
Education	2,005	221	11.0	48	18.59	195	88.2
Executive Office	53	0	.0	0	.00	0	.0
Labor	952	148	15.3	47	18.19	120	82.2
Licensing & Regulation	363	38	10.5	47	20.09	33	86.8
Lottery	233	25	10.7	45	15.48	21	84.0
Management & Budget	1,358	143	10.5	46	15.84	115	80.4
Mental Health	8,181	699	8.6	48	16.27	621	88.8
M.E.S.C.	2,555	315	12.3	48	15.41	267	84.8
Military Affairs	333	26	7.8	46	13.70	22	84.6
Natural Resources	3,842	147	4.0	43	16.36	116	78.9
Public Health	1,981	110	5.6	46	17.26	83	75.5
Social Services	13,543	1,092	8.1	46	15.78	980	89.7
State	2,345	260	11.1	44	15.26	182	70.0
State Police	3,051	86	2.8	46	17.10	79	91.9
Transportation	3,994	393	9.8	47	16.99	352	89.6
Trans. Bridge Authority	138	7	5.1	49	13.38	6	85.7
Treasury	1,479	134	9.1	45	17.32	118	88.1
STATEWIDE TOTALS	83,458	4,791	7.5	46	16.42	4,000	83.5

Source: KA5212P01, Average Age, Pay Rate, and Longevity Analysis for Handicappers by Department, pay period ending 9-28-91.

Table 4-8

AVERAGE AGE, PAY RATE, AND LONGEVITY ANALYSIS FOR HANDICAPPERS BY DEPARTMENT

Fiscal Year 1998-99

DEPARTMENT NAME	NUMBER OF EMPLOYEES	NUMBER OF HANDICAPPER EMPLOYEES	HANDICAPPER PERCENT OF ALL EMPLOYEES	HANDICAPPER AVERAGE AGE	HANDICAPPER AVERAGE HOURLY PAY RATE	NUMBER OF HANDICAPPERS RECEIVING LONGEVITY	PERCENT OF HANDICAPPERS ELIGIBLE FOR LONGEVITY
AGRICULTURE	681	31	4.7	49	$22.87	30	93.8
ATTORNEY GENERAL	683	16	2.9	51	$24.79	16	100.0
C.I.S. - UNEMPLOYMENT AGENCY	1,308	137	10.9	51	$19.94	135	98.5
CIVIL RIGHTS	100	10	6.3	48	$20.76	8	80.0
CIVIL SERVICE	209	10	8.1	50	$26.34	10	84.7
COMMUNITY HEALTH	5,672	300	6.5	49	$20.64	300	94.2
CONSUMER AND INDUSTRY SERVICES	2,601	183	6.9	48	$21.24	178	97.3
CORRECTIONS	17,332	812	4.7	47	$20.41	772	95.1
EDUCATION	400	34	7.2	49	$17.99	32	94.1
ENVIRONMENTAL QUALITY	1,877	67	3.6	47	$22.00	63	93.0
EXECUTIVE OFFICE	60	0	0.0	0	$0.00	0	0.0
FAMILY INDEPENDENCE AGENCY	13,136	880	6.6	49	$16.76	626	98.1
LEGISLATIVE	177	6	3.4	48	$30.02	6	100.0
MANAGEMENT AND BUDGET	1,082	118	6.0	48	$20.49	118	98.8
MI DEPARTMENT OF CAREER DEVELOPMENT	1,027	130	13.5	50	$20.41	121	94.2
MILITARY AND VETERANS AFFAIRS	880	40	4.8	48	$19.14	38	95.0
NATURAL RESOURCES	2,920	74	2.5	47	$18.38	61	82.4
STATE	2,382	180	7.5	48	$18.89	161	89.0
STATE POLICE	3,340	52	1.6	48	$20.66	50	96.2
TRANSPORTATION	2,301	206	6.2	49	$20.90	200	97.1
TREASURY	1,720	133	7.7	49	$21.18	130	97.7
STATEWIDE	61,091	3,400	5.7	48	$20.32	3,324	98.1

Source: MAIN MIDB Civil Service WF26, pay period ending 9-18-99.

BEST AVAIL

NE

Suzan Kern

From: <dseldon@notes.state.ne.us>
To: <skern@austin.rr.com>; <mmccrory@notes.state.ne.us>
Sent: Wednesday, June 21, 2000 8:35 AM
Subject: Statistical information on Persons with Disabilities.

As of March 30, 2000, Nebraska has 3.2% (16, 298/ 517) or 517 persons with a disability employed with the State. These figures include only employment with the State.

Dorsey Seldon,
Affirmative Action Specialist
DAS-State Personnel
402-471-3678

BLE COPY

Subject: Re: Statistical information on Persons with Disabilities.
Date: Thu, 22 Jun 2000 10:51:45 -0500
From: dseldon@notes.state.ne.us
To: "Suzan Kern" <skern@austin.rr.com>

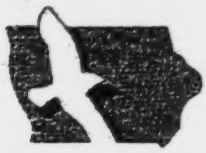
Suzan,
My records only go back to 1988. Prior to this time we did not keep accurate statistical data o n the employment of persons with a disability. This was also at the same time that we changed how we compiled the information. The information you are receiving is "as of March" of the data listed.
2000 3.2% 517/16,298
1999 3.2% 521/16,258
1998 3.4% 549/16,018
1997 3.5% 555/16,007
1996 3.5% 565/15.965
1995 3.7% 599/15,797
1994 3.9% 631/15,848
1993 4.0% 645/15,807
1992 4.0% 633/15,671
1991 4.2% 645/15,373
1990 4.3% 642/14,291

1989 4.2% 629/14,041
1988 4.0% 706/14,592

"Suzan Kern" <skern@austin.rr.com>
06/21/2000 12:30 PM

To: <dseldon@notes.state.ne.us>
cc:
Subject: Re: Statistical information on Persons with Disabillities.

Dorsey -- Of course, the answer is as soon as possible! I've been working for almost a month to get this info from all 50 states, and our brief deadline is looming. However, I understand that you are very busy, too. Please let me know how soon you think it would be reasonable for you to compile the information for 1980 and 1990. Thanks again. -- Suzan



Iowa Division of Persons with Disabilities
321 E. 12th St., Lucas State Office Building Des Moines, Iowa 50319
(515) 242-6172 V/TTY (888) 219-0471 V/TTY FAX (515) 242-6119
E-Mail: dhr.disabilities@dhr.state.ia.us

THOMAS J. VILSACK
GOVERNOR

SALLY J. PEDERSON
LIEUTENANT GOVERNOR

June 22, 2000

FAX COVER

To **Brian East**
Senior Attorney
Advocacy , Incorporated

FAX: **512-323-0902**

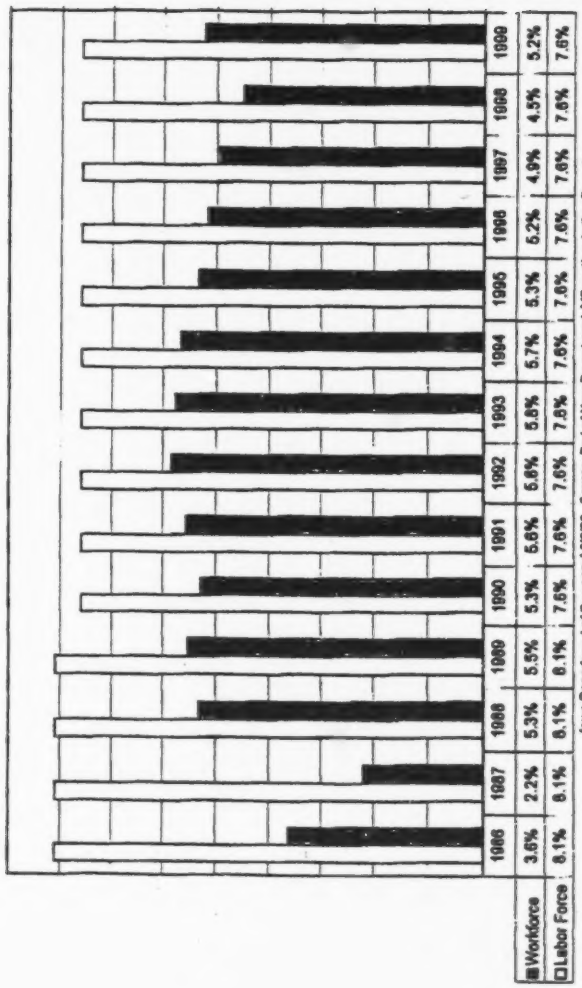
From: John H. TenPas, Disability Consultant
Division of Persons with Disabilities
Iowa Department of Human Rights
Lucas State Office Building
Des Moines, IA 50319
515-281-5969
1-888-219-0471
515-242-6119(fax)
john.tenpas@dhr.state.ia.us

Pages **1 of 3**

Subject: **Attached, is the information that you requested from the State of Iowa regarding employment of persons with disabilities in state government. I apologize for the length of time in completing this task and hope the information will still be helpful. Should you have any questions, please call me at the number above. Thank you.**

EOE Task Force
Graph #1

State of Iowa Executive Branch Full-Time Employees
Disabled Workforce vs Disabled Labor Force
All EEO4 Categories



	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999
Workforce	3.6%	2.2%	5.3%	5.5%	5.3%	5.6%	5.6%	5.8%	5.7%	5.3%	5.2%	4.9%	4.5%	5.2%
Labor Force	8.1%	8.1%	8.1%	8.1%	7.6%	7.6%	7.6%	7.8%	7.6%	7.8%	7.6%	7.6%	7.8%	7.6%

Iowa Department of Personnel 3/8/00 Source: End of Year Department Affirmative Action Reports

	Non-Disabled	PWD
1999	18,549	1,023
1998	18,065	853
1997	17,623	917
1996	17,655	960
1995	17,424	980
1994	17,333	1,039
1993	17,199	1,050
1992	17,636	1,094
1991	18,396	1,080
1990	19,156	1,066
1989	18,487	1,079
1988	18,421	1,033
1987	19,311	433
1986	19,743	741

Supreme Court, U.S.
FILED
AUG 11 2000
CLERK

No. 99-1240

IN THE

Supreme Court of the United States

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA-AND THE ALABAMA DEPARTMENT OF YOUTH SERVICES,
Petitioners,

v.

PATRICIA GARRETT AND MILTON ASH,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS AND UNITED CEREBRAL PALSY ASSOCIATIONS, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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August 11, 2000

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IN THE

Supreme Court Of The United States

No. 99-1240

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA AND THE ALABAMA DEPARTMENT OF YOUTH SERVICES,

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v.

PATRICIA GARRETT AND MILTON ASH,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS AND UNITED CEREBRAL PALSY ASSOCIATIONS, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*[1]

Amicus National Association of Protection and Advocacy Systems (NAPAS), founded in 1981, is the membership organization for the nationwide system of protection and advocacy (P&A) agencies. Located in all 50 States, the District of Columbia, Puerto Rico, and the territories (the

[1] No counsel for any party authored this brief either in whole or in part, and no persons other than the *amici curiae* and their counsel made any monetary contribution to its preparation or submission. The parties' written consents to the filing of this brief have been filed with the Clerk of the Court.

Virgin Islands, Guam, American Samoa, and the Northern Marianas Islands), P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all people with disabilities in a variety of settings. The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities. P&As are particularly active in providing assistance to persons with disabilities under the Americans with Disabilities Act ("ADA"). In fiscal year 1999 alone, P&As served well over 800,000 persons with disabilities through individual case representation, systemic advocacy, information and referral, and education and training.

Because of its national P&A membership and familiarity with the protections afforded by each State to persons with disabilities, NAPAS has firsthand knowledge of the state laws and how they operate in practice. NAPAS is thus uniquely suited to assist the Court in evaluating petitioners' arguments that Congress did not have authority under the Fourteenth Amendment to apply the ADA to the States because state laws were sufficient in 1990 (and are sufficient today) to prevent discrimination against persons with disabilities.

Amicus United Cerebral Palsy Associations, Inc. ("UCP"), is a Washington, D.C.-based non-for-profit corporation incorporated in 1948. The mission of UCP is to advance the independence, productivity and full citizenship of people with cerebral palsy and other disabilities, through its commitment to the principles of independence, inclusion and self-determination. UCP is the leading source of information on cerebral palsy and is a pivotal advocate for the rights of all people with disabilities. UCP and its nationwide network of 135 affiliates in 39 states strive to ensure the inclusion of persons with disabilities in every facet of society - from the web to the workplace, from the classroom to the community. The UCP family serves 30,000 children and adults with disabilities a day, or over 1,000,000 individuals each year.

UCP has a long-standing history of legal activism on behalf of the individuals with disabilities who are served by the UCP affiliate system. Given UCP's national presence and active work in most States, it is familiar with the state laws and how they operate in practice and, indeed, monitors and tracks the state laws for its affiliates.

INTRODUCTION AND SUMMARY

In enacting the ADA, Congress found that "discrimination against individuals with disabilities continue[s] to be a serious and pervasive social problem." 42 § 12101(a)(2). Such discrimination "persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." *Id.* § 12101(a)(3). And it persists in significant measure because the estimated "43,000,000 Americans" with disabilities "have often had no legal recourse to redress such discrimination." *Id.* § 12101(a)(1), (4). As a result, Congress concluded (*id.* § 12101(a)(9)) that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis" – a right guaranteed to all Americans under the Fourteenth Amendment to the United States Constitution.

Petitioners maintain, however, that Congress failed to identify any "pattern and practice of State equal-protection violations" in "alleged employment or public-access discrimination by State governments." Pet. Br. 4. Prior to the passage of the ADA, they claim, all "50 states" had passed "disability-discrimination law[s] applicable to public and private employers." *Id.* at 6-7. And today, petitioners continue, States "markedly overprotect . . . the constitutional rights of the disabled" (*id.* at 4) because "all 50 states have comprehensive measures guaranteeing the disabled access to public services and places" that in some cases exceed the relief afforded by the ADA. *Id.* at 6-7. In support of these

claims, petitioners have attached as Appendix A to their brief a list of the relevant state statutes that purportedly demonstrate this comprehensive state law protection for persons with disabilities.

These claims, on their face, are difficult to reconcile with the language and history of the ADA. It is hard to believe, for example, that if the 50 state legislatures had adequately addressed the problem of discrimination against individuals with disabilities, the "Fifty State Governors' committees" on whose reports Congress relied would have concluded that "existing State laws do not adequately counter such acts of discrimination."[2] And petitioners' glowing account of state law conflicts sharply with the conclusions of a bipartisan commission of predominantly state and local government officials, who reported in 1989 that irrational prejudice against persons with disabilities continued to lead numerous state and local officials throughout the country to deny employment to persons with disabilities.[3] Indeed, one must ask whether the ADA could have garnered such an overwhelming level of bipartisan and inter-governmental support – unprecedented for major civil rights legislation – had States already solved the problem.

They had not. A review of petitioners' Appendix A confirms that petitioners have greatly exaggerated the extent

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[2] *See, e.g.*, S. Rep. No. 101-116, at 18 (1989) ("S. Rep.").

[3] Advisory Comm'n on Intergovernmental Relations, *Disability Rights Mandates: Federal and State Compliance With Employment Protections and Architectural Barrier Removal*, at 72-73 (April 1989) ("state officials" and "representatives of state advocacy groups" identified "the significant and often negative impact of public and employer attitudes toward persons with disabilities" as a serious impediment to the employment of persons with disabilities "in state government"); *see also id.* at 73 ("Such attitudes have multiple dimensions, including feelings of discomfort in associating with disabled individuals, inaccurate assessments of their productivity, and concerns about the costs that might be associated with work place accommodations").

of state law protection for individuals with disabilities against invidious discrimination in 1990 and today. In reality, state law in 1990 reflected a patchwork of inconsistent coverage and remedies, often seriously limiting the ability of many persons with disabilities to gain redress for discrimination, and excluding some persons with disabilities from protection altogether. The specific ways in which petitioners' Appendix A overstates petitioners' case are summarized in the Appendix attached to this brief. For each State, the Appendix reproduces verbatim, in the left two columns, the information that petitioners provided in their Appendix A. In the right-hand column, labeled "comments," *amici* note specific limitations on the nature or scope of the coverage actually afforded by the provisions petitioners cite.

This analysis confirms that Congress acted well within the limits of its power to enforce the Fourteenth Amendment when it enacted the ADA. First, Congress was plainly responding to a massive denial of the right to equal protection of the laws that was limited neither to certain geographic areas nor to the private sector. Congress was well aware that discrimination against individuals with disabilities is rooted in pernicious myths and stereotypes to which state officials – like any other citizens – are not immune. And Congress expressly found that discrimination against persons with disabilities is a persistent, pervasive, societal problem that burdens the ability of a discrete class of Americans to participate equally in all aspects of public life – including numerous areas in which the States are heavily or predominantly involved. These findings, and the legislative record that supports them, amply demonstrate that Congress passed the ADA in response to a problem of constitutional dimensions.

Second, Congress acted within its "wide latitude" to remedy and deter violations of equal protection when it crafted the ADA. *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997). In responding to constitutional violations, Congress

may prohibit "a somewhat broader swath of conduct" than is forbidden by the Fourteenth Amendment. *Kimel* v. *Florida Bd. of Regents*, 120 S.Ct. 631, 644 (2000). Where, as here, "the evil presented" is serious and pervasive, Congress is fully empowered to take "[s]trong measures" to address it. *City of Boerne*, 521 U.S. at 530.

That Congress chose means well-suited to its purposes is borne out, in particular, by an analysis of the gaps and defects in state law at the time the ADA was passed. For example, in 1990, many States failed to provide coverage to all members of the discrete class of persons with disabilities that Congress found had been "subjected to a history of purposeful unequal treatment." 42 U.S.C. § 12101(a)(7). People with mental impairments, for example, such as mental illness or mental retardation, had no legal recourse against discrimination whatsoever under the laws of many States.

Where state laws did address discrimination, they often did so in ways that denied individuals with disabilities an effective remedy. For example, many States did not require employers to provide reasonable accommodation to persons with disabilities, thereby effectively allowing the fact of an individual's disability to excuse invidious discrimination. Similarly, many state remedial schemes lacked adequate provisions for recovery of damages, rendering them ineffective as both a remedy and a deterrent to discrimination. And many States had not begun to adapt their laws to address the unnecessary and inappropriate institutionalization of many Americans whose needs were better served in less restrictive environments. In each of these areas, the ADA implemented balanced and proven measures that appropriately responded to the history of unconstitutional discrimination and the failure of state laws to remedy or deter this discrimination. As national legislation, the ADA ensures that persons with disabilities have consistent protection from invidious discrimination no matter where they live or where they travel.

Finally, petitioners understate what is at stake in this case by overstating the degree to which state law today mirrors the protection of the ADA. Many States still fail to provide remedies comparable to those offered by the ADA, and thus would fail, standing alone, to deter invidious discrimination. And since some States are prepared to follow this attack on the ADA with a challenge to Congress's power under the Commerce Clause to enact all of Title II, the stakes here are very high indeed. Thus, not only was Congress acting within its enforcement power under the Fourteenth Amendment when it enacted the ADA, but the continuing vitality of the ADA remains vital to secure the guarantee of equal protection for all Americans.

ARGUMENT

I. CONGRESS ACTED WITHIN ITS SECTION 5 AUTHORITY IN ENACTING THE ADA.

A. Congress Has Wide Latitude In Enacting Legislation To Deter And Remedy State Violations Of Equal Protection.

Section 1 of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Section 5 of the Fourteenth Amendment provides: "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Section 5 is "'a positive grant of legislative power' to Congress." *City of Boerne* v. *Flores*, 521 U.S. 507, 517 (1997) (quoting *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966). This Court consistently has defined Congress's Section 5 power in "broad" terms. *Id.* at 517, 536; see *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976) ("When Congress acts pursuant to § 5 . . . it exercis[es] legislative

authority that is plenary within the terms of the constitutional grant").

When addressing whether Congress has acted within this broad grant of authority, the Court typically addresses two issues. First, the Court considers whether Congress was legislating in response to "conduct transgressing the Fourteenth Amendment's substantive provisions." *Florida Prepaid Postsecondary Ed. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 639 (1999). As the Court explained in *City of Boerne*, Congress does not have power to "decree the substance of the Fourteenth Amendment's restrictions"; it may enforce that amendment, but it cannot "chang[e] what the right is." 521 U.S. at 519. Defining the scope of the rights protected under the Fourteenth Amendment is, of course, the province of this Court.

Second, the Court addresses whether, in responding to a violation of the Fourteenth Amendment, there is "congruence and proportionality" between the violation and the remedy. *City of Boerne*, 521 U.S. at 520. In contrast to the first inquiry, the question of "'what legislation is needed to secure the guarantees of the Fourteenth Amendment'" is a matter chiefly committed to Congress, and for that reason "its conclusions are entitled to much deference." *Id.* at 536 (quoting *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966); see *Kimel* v. *Florida Bd. of Regents*, 120 S. Ct. 631, 644 (2000) (same).[4] Thus, Congress has broad leeway in fashioning legislative responses to constitutional violations.

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[4] *See also Ex Parte Virginia*, 100 U.S. 339, 345-46 (1879):

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

For example, in responding to a violation of the Fourteenth Amendment, Congress "is not confined" to legislation that is tailored to address only the unconstitutional conduct. *Kimel*, 120 S. Ct. at 644. "Rather, Congress' power 'to enforce' the Amendment includes the authority both to remedy *and to deter* violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Id.* (emphasis added) (citations omitted). Of course, at some point Congress's remedial and prophylactic legislation could sweep so far beyond the violation as to cross the line that separates valid enforcement action from "a substantive redefinition of the Fourteenth Amendment right at issue." *Id.* But because "Congress must have wide latitude in determining where [that line] lies," the Court's review is limited to a deferential assessment of whether there is "'a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Id.* (quoting *City of Boerne*, 521 U.S. at 520).

B. Congress Responded To Extraordinary Evidence Of Invidious Discrimination Against Persons With Disabilities, Including Discrimination By State Actors.

In asserting that Congress was not responding to a record of on-going and substantial violations of the right to equal protection, petitioners face an uphill battle. They must confront, first and foremost, the explicit findings in section 12101 of pervasive constitutional violations on which Congress expressly premised the ADA. For example, Congress found that discrimination against persons with disabilities

- "continue[s] to be a serious and pervasive social problem" (42 U.S.C. § 12101(a)(2));
- "persists in [numerous] critical areas" (*id.* § 12101(a)(3));

- affects individuals who "have often had no legal recourse" (*id.* § 12101(a)(4));

- is "continually encounter[ed in] various forms . . . including outright intentional exclusion" (*id.* § 12101(a)(5));

- "result[s] from stereotypic assumptions not truly indicative of the individual ability of such individuals" (*id.* § 12101(a)(7)); and

- "denies people with disabilities the opportunity to compete on an equal basis" (*id.* § 12101(a)(9)).

These codified findings of continuing discrimination capture the essence of what this Court has consistently defined as the violation of the Fourteenth Amendment right to the equal protection of the laws. It is difficult to imagine how Congress could have more directly and expressly identified a pattern of conduct denying persons the right to equal protection than it did in the ADA.

There is certainly no support for petitioners' contention that these explicit findings can support legislation against discrimination only in the private sector. To the contrary, many of the "critical areas" in which Congress expressly found discrimination to be "pervasive" – such as "employment, . . . education, . . . institutionalization, . . . voting, and access to public services" (*id.* § 12101(a)(3)) are areas in which state governments play at least a central if not dominant role. There is no private sector limitation to these arenas. Moreover, the underlying cause of the ongoing discrimination that Congress identified – the persistence of "stereotypic assumptions not truly indicative" of individual ability (*id.* § 12101(a)(7)) – applies as fully to individuals in public agencies as it does to those in the private sector. Thus, Congress's findings – both as to cause and effect – fully support its decision to extend the full protection of the ADA to those facing discrimination from state officials as well as from private actors.

The legislative record against which Congress made these findings amply supports them. As the briefs of respondents and other amici set forth in detail, Congress acted against a massive record of virulent discrimination – both historic and contemporary – that included discrimination by state and local agencies throughout the nation. These briefs further describe how the judicial record – which also serves as the basis for Congressional action – provides further confirmation that state and federal law had proven ineffective to deter state actors from discriminating against individuals with disabilities. As we show in Part I.C, the inability of state law to deter and remedy discrimination against persons with disabilities is not surprising – state law fell far short of providing the consistent coverage and meaningful remedies that Congress mandated in the ADA.

The findings and record here thus stand in stark contrast to those involving the Age Discrimination in Employment Act (ADEA) and the Religious Freedom Restoration Act (RFRA), on which petitioners heavily rely. For example, in the ADA, Congress extended protection only to a discrete class of persons who have been "subjected to a history of purposeful unequal treatment," whereas in the ADEA, Congress acted to protect a class to which "all persons" would eventually belong, and which has "not been subjected" to such a history of unequal treatment. *Kimel*, 120 S. Ct. at 645 (internal quotation omitted). Similarly, the record supporting the ADA is light-years removed from that supporting RFRA, where "[t]he history of persecution in this country detailed in the hearings mention[ed] no episodes occurring in the past 40 years." *City of Boerne*, 521 U.S. at 530. Thus, with respect to discrimination against persons with disabilities, Congress sought – and was amply justified, as a factual matter, in seeking – to remedy on-going discrimination on the part of the States.

C. The ADA Is A Congruent and Proportional Response To The States' Constitutional Violations, Which State Laws Failed To Address.

In responding to the fact of pervasive discrimination against individuals with disabilities, in both the public and private sectors, Congress crafted a statute that is congruent and proportional to the constitutional violations it found. That is true with respect to the way Congress defined the covered class, the prohibited conduct, and the available remedies.

In defining the class of persons with a disability, Congress drew on the Rehabilitation Act's definition of "handicapped individual," which this Court had previously recognized was an important and comprehensive means of combating societal discrimination against persons with disabilities. See, *e.g.*, 42 U.S.C. § 12102(2); *School Bd.* v. *Arline*, 480 U.S. 273, 281-86 (1987). And in devising a remedial scheme, Congress borrowed from the Rehabilitation Act as well as from the enforcement provisions for Title VII of the Civil Rights Act. See, *e.g.*, 42 U.S.C. § 12117 (incorporating into Title I of the ADA various "powers, remedies, and procedures" of Title VII); *id.* § 12133 (incorporating into Title II of the ADA various "remedies, procedures, and rights" set forth in Section 504 of the Rehabilitation Act). Because Congress found that the scope of "the evil presented" was vast, it reasonably concluded that "clear, strong, consistent, enforceable standards" (*id.* § 12101(b)(2)) comparable to those used to combat other forms of discrimination were needed here as well.

In concluding that national standards were needed to complement existing state law remedies, Congress was also aware of the inadequacy of existing state laws. The Senate Report observes, for example, that "State laws are inadequate to address the pervasive problems of discrimination that people with disabilities are facing." S. Rep. at 18. The Senate Report also notes that the "fifty State Governors' Committees, with whom the President's Committee works,

report that existing State laws do not adequately counter such acts of discrimination." *Id.* Congressional testimony further supported these findings. See, *e.g.*, *Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong. 299, 334 (1989) (statement of Arlene B. Mayerson) ("While 44 states have passed laws prohibiting employment discrimination against persons with disabilities, only twelve are comparable to the Rehabilitation Act in providing protections against discriminatory practices"); *id.* at 335 ("[M]any state statutes have very restrictive definitions of 'handicap.'"); *id.* at 336 ("[N]early one-half of the states do not require any reasonable accommodation" and of those that do, "several define the term restrictively").[5]

Because petitioners have challenged these congressional findings, however, it is useful to examine more closely the level of protection that state law actually provided in 1990. Such a review confirms that – by comparison with the ADA – state law was plagued by gaps in coverage and remedies that are more than sufficient to explain the continuing failure of state law to deter discrimination against persons with disabilities in both the public and private sectors, and to justify the particular legislative measures that Congress took.

1. Coverage

Congress had to define the class of persons eligible for the protection it provided, and it did so in a way that was entirely commensurate with the record of discrimination that it sought to address. Congress adopted a definition that afforded protection to many individuals with disabilities that the States had failed to cover.

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[5] *See also* J. Flaccus, *Handicap Discrimination Legislation: With Such Inadequate Coverage at the Federal Level, Can State Legislation Be of Any Help?*, 40 Ark. L. Rev. 185, 261 (1986) (summarizing limits of state law protection) (cited in testimony of Arlene B. Mayerson).

Specifically, Congress adopted a functional definition of disability. Under the ADA:

> The term 'disability' means, with respect to an individual –
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). By defining disability in this functional manner, Congress ensured that no individual with a significant impairment likely to give rise to discrimination would be excluded from coverage under the ADA. In this respect, Congress responded to significant areas of discrimination that state laws failed to cover.

For example, many States wholly excluded people with mental impairments from any protection against discrimination on that basis. In 1990, 12 States did not cover people with mental illness,[6] and 7 States did not cover people with mental retardation.[7] Thus, in these jurisdictions, individuals who Congress found to have been subject to a

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[6] *See* Ala. Code § 21-7-8 (1990); Ariz. Rev. Stat. Ann. § 41-1461(4) (West 1990); Cal. Gov't Code § 12926(h) (West 1990); Colo. Rev. Stat. Ann. § 24-34-402(1)(a) (West 1990), *cf. AT&T Techs., Inc.* v. *Royston*, 772 P.2d (Colo. Ct. App. 1989); Ga. Code Ann. § 34-6A-2(7)(B) (1990); Kan. Stat. Ann. § 44-1002 (1990); Ky. Rev. Stat. Ann. § 207.130 (1990); La. Rev. Stat. Ann. § 46:2253 (West 1990); Mich. Comp. Laws § 37.1103 (1990); Miss. Code Ann. § 43-6-15 (1990); Nev. Rev. Stat. §§ 281.370, 613.330 (1990); N.H. Rev. Stat. Ann. § 354-A:3 (1990).

[7] *See* Ala. Code § 21-7-8 (1990); Ariz. Rev. Stat. Ann. § 41-1461(4) (West 1990); Colo. Rev. Stat. Ann. § 24-34-402(1)(a) (West 1990), *cf. AT&T Techs., Inc.* v. *Royston*, 772 P.2d (Colo. Ct. App. 1989); Kan. Stat. Ann. § 44-1002 (1990); Ky. Rev. Stat. Ann. § 207.130 (Michie 1990); Miss. Code Ann. § 43-6-15 (1990); Nev. Rev. Stat. §§ 281.370, 613.330 (1990).

long history of discriminatory treatment[8] were denied access to the remedies that the State offered to those who could show a different type of impairment. Moreover, one jurisdiction limited the coverage even of those with physical disabilities by excluding all persons with communicable diseases.[9] Arkansas did not prohibit employment discrimination against the disabled at all in 1990.

Similarly, in borrowing its definition of disability from the Rehabilitation Act, Congress included not only those individuals with a physical or mental impairment that currently operated to substantially limit a major life activity, but those who had a "record of" or who were "regarded as" having such an impairment. 42 U.S.C. § 12102(2).

The importance of these definitions cannot be gainsaid. This Court relied on the complainant's "record of" impairment in concluding that an elementary school teacher had a cause of action under the Rehabilitation Act against the local public school board for irrational discrimination based on a past impairment (tuberculosis). *Arline*, 480 U.S. at 281. Congress specifically included in the ADA's coverage individuals who have a "record of" impairment in order to protect "individuals who have recovered from a physical or mental impairment which previously substantially limited them, in a major life activity." S. Rep. at 23. Congress cited as frequently occurring examples of this group individuals with histories of mental or emotional illness, heart disease or cancer, and individuals who have been misclassified as mentally retarded. *Id.*

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[8] 42 U.S.C. § 12101(a) (citing to pervasive history of discrimination suffered by persons with "physical *or mental* disabilities") (emphasis added); *see also City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 461-65 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part) (detailing history of invidious discrimination against the mentally retarded).

[9] Ky. Rev. Stat. Ann. § 207.140(2)(c) (Michie 1990).

As for the "regarded as" prong, Congress first recognized its importance when it amended the Rehabilitation Act in 1974 to include such coverage. As this Court observed, this amendment reflected Congress's "acknowledge[ment] that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." *Arline*, 480 U.S. at 284.

And indeed, the legislative history of the ADA confirms that many of those most vulnerable to irrational and invidious discrimination on the basis of misperceptions of disability would lack a remedy absent coverage under the "regarded as" definition. Congress sought to protect "individuals who have impairments that do not in fact substantially limit their functioning" but that may give rise to "negative attitudes" in others, such as burn victims, or individuals with medical conditions that are under control, such as diabetes, high blood pressure, or epilepsy. S. Rep. at 23-24; *see Sutton* v. *United Air Lines*, 527 U.S. 471, 488 (1999).

Nevertheless, in 1990 – 15 years after the Rehabilitation Act amendments and 3 years after *Arline* – 17 States did not protect those who had a record of disability,[10] and 22 States did not protect those who were regarded as having a disability.[11] One State even affirmatively excluded persons

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[10] *See* Ala. Code § 21-7-8 (1990); Ariz. Rev. Stat. Ann. § 41-1461(4) (West 1990); Cal. Gov't Code § 12926(h) (1990); Ind. Code Ann. § 22-9-1-3(r) (West 1990); Iowa Code Ann. § 216.2 (West 1990); Kan. Stat. Ann. § 44-1002 (1990); Ky. Rev. Stat. Ann. § 207.130 (Michie 1990); Me. Rev. Stat. Ann. tit. 5, § 4553 (West 1990); Md. Ann. Code art. 49B, § 15(g) (1990); Miss. Code Ann. § 43-6-15 (1990); Mont. Code Ann. §§ 49-2-101, 49-3-101, 39-30-103 (1990); Neb. Rev. Stat. § 48-1102 (1990); Nev. Rev. Stat. §§ 281.370, 613.330 (1990); N.H. Rev. Stat. Ann. § 354-A:3 (1990); N.Y. Exec. Law § 292(21)(a) (McKinney 1990); Tenn. Code Ann. § 8-50-103 (1990); Utah Code Ann. § 34-35-2(9) (1990).

[11] *See* Ala. Code § 21-7-8 (1990); Ariz. Rev. Stat. Ann. § 41-1461(4) (West 1990); Cal. Gov't Code § 12926(h) (1990); Conn. Gen. Stat. Ann. § 462-60(a)(1) (West 1990); Ga. Code Ann. § 34-6A-2(3) (1990); Ind.

with any "cosmetic disfigurement" from protection against discrimination.[12] The ADA directly protects all these individuals from discrimination.

At the same time, as this Court has held, the ADA does not sweep so broadly in its coverage as to include, for example, those individuals with an impairment, such as myopia, that is correctable and that, in its corrected state, does not substantially limit a major life activity. See *Sutton*, 527 U.S. at 471. By covering only "a confined, and historically disadvantaged, class," (*id.* at 495) (Ginsburg, J., concurring), and not extending protection to every individual who could claim any sort of impairment, the ADA is appropriately tailored to extend only to the discrete class of persons who have been subjected to denials of their right to equal treatment under the law.

2. Reasonable Accommodation

The ADA's broad requirement of reasonable accommodation likewise is a congruent and proportional response to discrimination against persons with disabilities that many States failed to deter. "Discrimination" under the ADA includes:

> not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or

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Code Ann. § 22-9-1-3(r) (West 1990); Iowa Code Ann. § 216.2 (West 1990); Kan. Stat. Ann. § 44-1002 (1990); Ky. Rev. Stat. Ann. § 207.130 (Michie 1990); Me. Rev. Stat. Ann. tit. 5, § 4553 (1990); Md. Ann. Code art. 49B, § 15(g) (1990); Mich. Comp. Laws § 37.1103 (1990); Miss. Code Ann. § 43-6-15 (1990); Mont. Code Ann. §§ 49-2-101, 49-3-101, 39-30-103 (1990); Neb. Rev. Stat. § 48-1102 (1990); Nev. Rev. Stat. §§ 281.370, 613.330 (1990); N.H. Rev. Stat. Ann. § 354-A:3 (1990); N.Y. Exec. Law § 292(21)(a) (McKinney 1990); Tenn. Code Ann. § 8-50-103 (1990); Tex. Lab. Code Ann. § 21.051 (West 1990); Utah Code Ann. § 34-35-2(9) (1990); Va. Code Ann. § 51.5-3 (Michie 1990).

[12] *See* La. Rev. Stat. Ann. § 46:2253 (West 1990).

> employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.

42 U.S.C. § 12112(b)(5)(A). This uniform national requirement was necessary to remedy and deter discrimination because 15 States wholly lacked reasonable accommodation requirements,[13] and additional States limited their reasonable accommodation requirements so as to render them virtually meaningless.[14] See S. Rep. at 9 ("[T]he major categories of job discrimination faced by people with disabilities include . . . failure to provide or make available reasonable accommodations").

Reasonable accommodation requirements can often be a critical remedy for individuals with disabilities. That is because, in the absence of a requirement, it is all too easy for an employer to point to a supposed concern about the cost of making any accommodation for a person with disabilities, and to use that unexamined concern as an excuse to justify what is in reality a decision motivated by prejudice against a person

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[13] *See* Ala. Admin. Code r. 670-x-4-.03 (1990); Ala. Code § 21-7-8 (1990); Ark. Code contained no prohibition of employment discrimination against the disabled in 1990; Fla. Stat. ch. 760.10 (1990); Ga. Code Ann. § 34-6A-4(a) (1990); Haw. Rev. Stat. Ann. § 378-3(3) (Michie 1990); Ind. Code Ann. § 22-9-1-3 (West 1990); Ky. Rev. Stat. Ann. § 207.150 (Michie 1990); Miss. Code Ann. § 43-6-15 (1990); Mont. Code Ann. § 49-2-101 (1990); Nev. Rev. Stat. §§ 281.370, 613.330 (1990); N.H. Rev. Stat. Ann. § 354-A:8 (1990); Okla. Stat. Ann. tit. 25, § 1302 (West 1990); S.C. Code Ann. § 1-13-80(A) (Law. Co-op. 1990); Tenn. Code Ann. § 8-50-103(a) (1990); Utah Code Ann. § 34-35-6 (1990).

[14] *See, e.g.*, La. Rev. Stat. Ann. § 46:2253 (West 1990) (not requiring employer to spend more for architectural modifications than amount allowed as federal tax deduction); Neb. Rev. Stat. § 48-1102 (1990) (not requiring accommodations that entail more than "de minimis expense"); N.C. Gen. Stat. § 168A-3 (1990) (not requiring accommodation if cost of making changes over course of disabled person's employment would exceed 5% of employee's annual salary).

with a disability. The reasonable accommodation requirement thus serves the critical purpose of ensuring that an employer's professed concerns about whether a particular workplace or program can accommodate a person with a disability are not simply accepted at face value, but are tested against an individualized and reasonable assessment of the facts and circumstances of the individual and the job or program in question.

For example, respondent Ash's principal claim is that his public employer refused to take reasonable steps to accommodate his respiratory diseases, even though he was only asking that his employer enforce *its own* no-smoking policy and bring its vehicles into compliance with state law -- and even though he provided evidence from his doctor establishing that these steps were necessary for his continued health. Mr. Ash sought reasonable accommodations as a sensible and workable way of allowing him to continue in his employment without jeopardizing his health. Were his public employer not obligated to provide such accommodation, it is not clear that he either could or would continue in his present employment.

Accordingly, persons with disabilities must be treated on an individualized basis in order to avoid discriminatory treatment (such as requiring an employee with respiratory illnesses to drive vehicles that do not meet state emissions safety standards). This is precisely what reasonable accommodation requirements do. They require employers to address persons with disabilities on an individualized basis and attempt to identify reasonable accommodations that will enable successful employment. At the same time, by ensuring that no defendant must endure an "undue hardship" in accommodating the needs of persons with disabilities, 42 U.S.C. § 12112(b)(5)(A), the ADA properly cabins its scope to meet its goals through measured and reasonable means.

3. Remedies

The ADA's remedial scheme similarly reflects Congress's reasonable decision that the record of pervasive discrimination against individuals with disabilities could be traced, in part, to the inadequacy of many state remedies. For example, in 1990, in 16 States, compensatory damages were wholly unavailable (even to remedy and deter intentional discrimination),[15] and in 3 States, complainants had no private right of action at all.[16]

These remedial and enforcement limits substantially limited the effectiveness of state anti-discrimination laws. They deterred the filing of claims rather than the practice of discrimination. Without effective private rights of action,

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[15] Ala. Admin. Code r. 670-x-4-.03 (1990); Ark. Code contained no prohibition of employment discrimination against the disabled in 1990; Ariz. Rev. Stat. Ann. § 41-1481(G) (West 1990); Colo. Rev. Stat. Ann. §§ 24-34-306, 24-34-405 (West 1990); Conn. Gen. Stat. Ann. §§ 46a-60, 46a-86 (West 1990), *cf. Bridgeport Hosp.* v. *Commission on Human Rights & Opportunities*, 653 A.2d 782 (Conn. 1995); Del. Code Ann. tit. 19, §§ 712, 727 (1990); Md. Ann. Code art. 49B, § 11 (1990); Miss. Code Ann. §§ 25-9-131, -132 (1990); Neb. Rev. Stat. § 48-1119 (1990); N.C. Gen. Stat. § 168A-11(b) (1990); N.D. Cent. Code § 14-02.4-20 (1990); R.I. Gen. Laws § 28-5-24 (1990); S.D. Codified Laws § 20-13-35.1 (Michie 1990); Tex. Lab. Code Ann. § 21.258 (West 1990); Utah Code Ann. § 34A-35-7.1(9), (15) (1990); Wis. Stat. § 111.39 (1990).

Additional States have capped compensatory damages at extremely low amounts. *See, e.g.*, Kan. Stat. Ann. § 44-1005(k) (1990, 2000) (in 1990 and today, limits emotional damages to $2,000); S.C. Code Ann. §§ 43-33-540, -550 (Law. Co-op. 1990, 2000) (in 1990 and today, limits actual damages to $5,000); Wash. Rev. Code § 49.60.250 (1990, 2000) (compensatory damages in administrative proceedings limited to $1,000 in 1990 and $10,000 today); W. Va. Code § 5-11-13 (1990, 2000) (in 1990 and today, compensatory damages in administrative proceedings limited to the equivalent of $1,000 in 1977 dollars).

[16] Ala. Admin. Code r. 670-x-4-.03 (1990); Ala. Code § 21-7-8 (1990); Ark. Code contained no prohibition of employment discrimination against the disabled in 1990; Md. Ann. Code art. 49B, §§ 10, 11 (1990).

complainants had to rely on administrative enforcement schemes and were limited in the relief that they could obtain. Where damages were unavailable, complainants had limited incentive to sue.

The remedial and enforcement provisions of the ADA are a proportionate response to persistent discrimination by state actors. These provisions overcome the specific deficiencies in state laws that made it difficult for many complainants to obtain effective and meaningful relief. The employment discrimination provisions in Title I of the ADA incorporate by reference the enforcement provisions under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 12117(a). Under this scheme, complainants may bring a private right of action in federal court once they have exhausted their administrative remedies with the EEOC. Available relief includes injunctive relief and back pay accruing from two years prior to the filing of the EEOC charge. *Id.* § 2000e-5(g). Compensatory damages are available against respondents who engage in "unlawful intentional discrimination" or who violate the provisions concerning reasonable accommodation. *Id.* § 1981a(a)(2).

Similarly, the public services discrimination provisions in Title II of the ADA incorporate by reference the enforcement provisions under Section 504 of the Rehabilitation Act (which themselves are based on the enforcement provisions of Title VI of the Civil Rights Act of 1964). *Id.* § 12133 (incorporating enforcement provisions of Section 504, 29 U.S.C. § 794a). Under this scheme, plaintiffs may bring a private right of action without exhausting any administrative remedies and may obtain injunctive relief and damages.

By basing the remedies under the ADA on the proven anti-discrimination measures of Title VII and the Rehabilitation Act, Congress again acted prudently and well within its discretion to respond congruently and proportionately to the record of invidious discrimination by creating a uniform national remedy and enforcement scheme to deter

unconstitutional conduct that state remedial schemes, with their many gaps and weaknesses, did not deter.

4. Community Integration

Petitioners also claim that the States had fully addressed discrimination in the area of institutionalization. In reality, the ADA is a proportional response to pervasive discrimination in the form of unjustified institutionalization. See 42 U.S.C. § 12101(a)(3); see also *Olmstead* v. *L.C. ex rel. Zimring*, 527 U.S. 581, 600 (1999) (recognizing "that unjustified institutional isolation of persons with disabilities is a form of discrimination"); *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 464 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part) (noting that the "lengthy and continuing isolation" of persons with disabilities "perpetuated the ignorance, irrational fears, and stereotyping that long have plagued them"). To remedy this past discrimination, ADA regulations require public entities to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d) (1998). Public entities must also make "reasonable modifications," but need not do so if "the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7).

In their Appendix A, petitioners mischaracterize various state statutes as "state policies favoring deinstitutionalization." Nearly all of these state statutes apply only to civil commitment proceedings for a subset of persons with disabilities (those with mental illness), see Appendix, and some are further limited to only those who pose a substantial risk of harm to themselves or others.[17] The ADA, on the other hand, applies to all persons with disabilities residing in

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[17] *See, e.g.*, 405 Ill. Comp. Stat. §§ 5/1-119, 5/3-811 (West 1990); Md. Code Ann. Health-Gen. § 10-632(e)(2) (1990); Mass. Gen. Laws ch. 123 § 8 (1978).

institutions, nursing homes, and other facilities, not just those who have been civilly committed.[18] Moreover, the ADA, unlike many state policy statements, creates enforceable rights to placement in the most integrated setting appropriate, whereas state law at best does not require anyone to be moved unless there is an existing community placement already available and unfilled[19] – a circumstance that rarely occurs. At the same time, the ADA also takes into account the practical and fiscal burdens of implementing reasonable modifications.[20] In so doing, the ADA is yet another congruent and proportional response to the long history of discrimination left unaddressed by the States.

II. INVALIDATING THE ADA PROVISIONS PROVIDING FOR DAMAGES AGAINST THE STATES WOULD SEVERELY UNDERMINE THE PROTECTIONS AFFORDED TO PERSONS WITH DISABILITIES.

The issue before the Court is one of substantial importance, and with substantial consequences, for individuals with disabilities. If this Court invalidates the ADA provisions providing for a damages remedy against the States, persons with disabilities in many States will lack any comparable remedy. Even though many States after 1990 took action to

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[18] *See* 28 C.F.R. § 35.130(d) (applicable to all "qualified individuals with disabilities").

[19] *E.g., Department of Health and Mental Hygiene* v. *Dillman*, 695 A.2d 211 (Md. 1997).

[20] *See* 28 C.F.R. § 35.130(b)(7) (providing exception to reasonable modification requirement if modification fundamentally alters the service, program or activity); *see Olmstead*, 527 U.S. at 604 ("Sensibly construed, the fundamental-alteration component of the reasonable-modification regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities").

upgrade their laws and duplicate the protections afforded by the ADA, a significant number did not. The fact remains that there are substantial gaps and shortcomings in state laws today. For example, even today, 6 States lack a reasonable accommodation requirement,[21] and 2 States still do not allow complainants to bring a private right of action.[22] In 7 other States, a compensatory damages remedy is still unavailable.[23] Even where state laws do provide for a damages remedy against the States, this remedy is not uniformly available to all persons with disabilities in many States due to the fact that many state laws do not cover certain subpopulations of individuals with disabilities. For example, 6 state laws still do not cover people with mental illness;[24] 4 state laws still do not cover people with mental retardation;[25] 8 state laws still

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[21] Ala. Admin. Code r. 670-x-4-.03 (2000); Ala. Code § 21-7-8 (2000); Ga. Code Ann. § 34-6A-4(a) (1999); Haw. Rev. Stat. Ann. § 378-3(3) (Michie 1999); Ind. Code Ann. § 22-9-1-3 (West 2000); Miss. Code Ann. § 43-6-15 (2000); N.H. Rev. Stat. Ann. § 354-A:7 (1999).

[22] Ala. Admin. Code r. 670-x-4-.03 (2000); Ala. Code § 21-7-8 (2000); Md. Ann. Code art. 49B, §§ 10, 11 (1999).

[23] Ariz. Rev. Stat. Ann. § 41-1481(G) (West 2000); Ark. Code Ann. § 16-123-107(c)(2)(A) (Michie 1999); Miss. Code Ann. §§ 25-9-131, -132 (2000); N.C. Gen. Stat. § 168A-11(b) (2000); N.D. Cent. Code § 14-02.4-20 (1999); Utah Code Ann. § 34A-5-107(9) (1999), *cf. Barton* v. *Exam Ctr. Indus. and Gen. Med. Clinic, Inc.*, 994 P.2d 1261, 1267 (Utah 2000); Wis. Stat. § 111.39 (2000).

[24] Ala. Code § 21-7-8 (2000); Ariz. Rev. Stat. Ann. § 41-1461(4) (West 2000); Colo. Rev. Stat. Ann. § 24-34-402(1)(a) (West 1999), *cf. AT&T Techs., Inc.* v. *Royston*, 772 P.2d 1182 (Colo. Ct. App. 1989); Ga. Code Ann. § 34-6A-2(7)(B) (1999); La. Rev. Stat. Ann. § 23:322 (West 2000); Miss. Code Ann. § 43-6-15 (2000).

[25] Ala. Code § 21-7-8 (2000); Ariz. Rev. Stat. Ann. § 41-1461(4) (West 2000); Colo. Rev. Stat. Ann. § 24-34-402(1)(a) (West 1999), *cf. AT&T Techs., Inc.* v. *Royston*, 772 P.2d 1182 (Colo. Ct. App. 1989); Miss. Code Ann. § 43-6-15 (2000).

do not cover people who have a record of impairment;[26] and 8 state laws still do not cover people who are regarded as having an impairment.[27] Finally, even where state statutes nominally offer a remedy, case backlogs and other procedural and resource limitations often make it very difficult for complainants to use state procedures to enforce their rights.

There is no reason to think that the state legislatures will act now to rectify the deficiencies in their laws, given that they have not done so in the ten years since the ADA was enacted. And, of course, discrimination against persons with disabilities will not simply go away. Accordingly, the comprehensive coverage and remedies available under the ADA are vital to the protection of persons with disabilities and many persons with disabilities will be harmed if these protections are taken away.

Moreover, the impact of a decision that the ADA provisions at issue cannot be sustained under Section 5 may go beyond the ADA's damages remedy. Vindication of Congress's decision to invoke its enforcement authority under the Fourteenth Amendment is important because some States are prepared to argue (and, indeed, already have argued)[28] that

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[26] Ala. Code § 21-7-8 (2000); Ark. Code Ann. § 16-123-102 (Michie 1999); Ind. Code Ann. § 22-9-1-3(r) (West 2000); Iowa Code Ann. § 216.2 (West 1999); N.Y. Exec. Law § 292(21)(a) (McKinney 2000); Md. Ann. Code art. 49B, § 15(g) (1999); Miss. Code Ann. § 43-6-15 (2000); Utah Code Ann. § 34A-5-102(5) (2000).

[27] Ark. Code Ann. § 16-123-102 (Michie 1999); Ga. Code Ann. § 34-6A-2(3) (1999); Iowa Code Ann. § 216.2 (West 1999); N.Y. Exec. Law § 292(21)(a) (McKinney 2000); Md. Ann. Code art. 49B, § 15(g) (1999); Miss. Code Ann. § 43-6-15 (2000); Utah Code Ann. § 34A-5-102(5) (2000); Va. Code Ann. § 51.5-3 (Michie 2000).

[28] *See, e.g.*, *Amos* v. *Maryland Dep't of Pub. Safety and Correctional Servs.*, 178 F.3d 212, 223 (4th Cir. 1999) (declining to address whether Congress properly invoked its Commerce Clause authority in enacting the ADA and making it applicable to state prisons after concluding that the statute was a valid exercise of Congress's Section 5 power), *vacated*

Title II of the ADA is invalid in its entirety because it is not within Congress's power under the Commerce Clause or the Spending Clause. *Amici* believe that Title II will be sustained on Commerce Clause grounds, but recognize that the issue will engender much litigation and may ultimately reach this Court. And were the States to prevail in invalidating Title II of the ADA, the protections afforded to individuals with disabilities would be severely undermined. Accordingly, the stakes are significant in this case and invalidation of the ADA's damages remedy against the States would have profound adverse consequences for persons with disabilities.

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without opinion (Dec. 28, 1999); *see also Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 210-11 (1998) (declining to address petitioners' argument that application of Title II of the ADA to state prisons is not a constitutional exercise of Congress's power under either the Commerce Clause or Section 5 because petitioners did not raise the argument below). *Cf. Bradley* v. *Arkansas Dep't of Educ.*, 189 F.3d 745, 757-58 (8th Cir.) (granting petition for rehearing en banc to consider whether § 504 of the Rehabilitation Act is unconstitutional as applied to the States because it exceeds Congress's spending power), *vacated in part, reh'g en banc granted in part sub. nom. Jim C.* v. *Arkansas Dep't of Educ.*, 197 F.3d 958 (8th Cir. 1999).

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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APPENDIX

	ALABAMA	COMMENTS
Prohibits employment discrimination based upon disability	Ala. Admin. Code r. 670-x-4-.01*	Both in 1990 and today, r. 670-x-4-.01 did not apply to the broad category of state employees exempted from coverage, in r. 670-x-3-.01(f)(3), including, *inter alia*, all state university employees, elected officials, and all "inmate help" in state correctional facilities. Both in 1990 and today, § 21-7-8 of the Alabama Code mandated employers to offer publicly-funded employment only to physically disabled persons "on the same terms and conditions" as the "able-bodied." Both in 1990 and today, neither provision contained a reasonable accommodation requirement.

* Applies to state employees only.

Applicable to the State and other public employers	Ala. Admin. Code r. 670-x-4-.01	
Applicable to the State pre-1990**	Ala. Admin. Code r. 670-x-4-.01 (1981)	
Equitable and monetary remedies available	Ala. Admin. Code r. 670-x-4-.03	Both in 1990 and today, r. 670-x-4-.03 required review before the State Personnel Board. Both in 1990 and today, neither r. 670-x-.01 nor § 21-7-8 provide for a private right of action in the Alabama courts.
State policies advancing the hiring of persons with disabilities	Ala. Code § 21-7-8 (1975), § 21-5-1 (1965), § 36-26-16	
State policies requiring accessibility and accommodation	§§ 21-4-1 (1965), 21-7-2, 21-7-3 (1975)	Both in 1990 and today, §§ 21-4-1, 21-7-2, and 21-7-3 applied only to those with a physical disability.

** Date indicated is the year the law both applied to the State and prohibited discrimination on the basis of disability.

State policies favoring de-institutionalization	§§ 22-52-37 (a)(7) (1975), 38-9-6(c) (1977), 22-52-10.1 (1977)	Both in 1990 and today, § 22-52-37 applied only to involuntary commitment proceedings for persons with mental disorders found to pose a "a real and present threat of substantial harm" to themselves or others. Both in 1990 and today, § 38-9-6 applied only to protective placement petitions for adults deemed unable to provide for their own protection from abuse or neglect.

	ALASKA	COMMENTS
Prohibits employment discrimination based upon disability	Alaska Stat. § 18.80.220	
Applicable to the State and other public employers	§ 18.80.300 (4), (16)	
Applicable to the State pre-1990	§§ 18.80.220, 18.80.300(4), (16) (1975)	
Equitable and monetary remedies available	§§ 22.10.020(i), 18.80.130	
State policies advancing the hiring of persons with disabilities	§§ 18.80.200 (1987), 23.15.220 (1960)	

State policies requiring accessibility and accommodation	§§ 35.10.015 (1966), 11.76.130 (1987), 18.80.230 (1965)	In both 1990 and today, § 35.10.015 applied only to public buildings – not all places of public accommodation. In both 1990 and today, § 18.80.230 provided no reasonable accommodation requirement, forbidding only the outright denial of use. Alaska Commission on Human Rights does not have the authority to award compensatory or punitive damages to complainants in cases of public accommodation discrimination. *See* *McDaniel* v. *Cory*, 631 P.2d 82 (Alaska 1981).
State policies favoring de-institutionalization	§ 47.30.735(d) (1981)	Both in 1990 and today, this statute applied only to involuntary commitment proceedings for an individual who is "mentally ill and as a result is likely to cause harm to [self] or others or is gravely disabled."

	ARIZONA	COMMENTS
Prohibits employment discrimination based upon disability	Ariz. Rev. Stat. § 41-1463.B1	Both in 1990 and today, statute did not cover mental impairments. § 41-1461(4). In 1990, statute did not cover those with a "record of" or "regarded as" having a physical or mental impairment. § 41-1461(4).
Applicable to the State and other public employers	§§ 41-1461.2, -1461.6	
Applicable to the State pre-1990	§§ 41-1463.B1, 41.1461.2, -1461.6 (1985)	
Equitable and monetary remedies available	§ 41-1481.D, .G	Both in 1990 and today, no compensatory damages were available.
State policies advancing the hiring of persons with disabilities	Exec. Order 89-7 (1989), 92-2 (1992)	

State policies requiring accessibility and accommodation	§§ 41-1492.01 (1967), 11-1024 (1965)	In 1990, § 41-1492.01 had not been enacted. In 1990 and today, these statutes did not cover state services, programs or activities.
State policies favoring de-institutionalization	§ 36-540.B (1983)	Both in 1990 and today, this statute applied only to involuntary commitment proceedings for persons with mental disorders found to pose a danger to themselves or others or who are persistently, acutely, or gravely disabled and in need of treatment.

	ARKANSAS	COMMENTS
Prohibits employment discrimination based upon disability	Ark. Code § 16-123-107(a)(1); Exec. Order 93-1 (1993)	In 1990, there was no prohibition against employment discrimination based on disability. Ark. Civil Rights Act, §§ 16-123-101 et seq. was not enacted until 1993. Definition of "disability" does not cover those with "record of" or "regarded as" having a disability. § 16-123-102(3).
Applicable to the State and other public employers	Exec. Order 93-1 (1993)	Exec. Order 93-1 does not cover employment discrimination based on disability; its purpose is to create a Health Care Reform Task Force to provide recommendations to the Government regarding Federal health care reforms.

Applicable to the State pre-1990	Exec. Order 86-1 (1985) (voluntary enforcement)	Exec. Order 86-1 (1990) is merely a general order requiring all state agencies to implement general personnel grievance procedures.
Equitable and monetary remedies available	§§ 16-123-107(c), 19-10-208; Exec. Order 93-1 (1993)	
State policies advancing the hiring of persons with disabilities	§ 20-14-301(b) (1973); § 22-3-1303 (1969)	Both in 1990 and today, § 20-14-301(b) covered only those with physical disabilities. Both in 1990 and today, § 22-3-1303 was limited to preferences for "blind persons operating vending facilities on state property."

State policies requiring accessibility and accommodation	§§ 27-15-301, -306 (1985), 20-14-303 (1973)	In both 1990 and today, § 20-14-202(a) was limited to the physically disabled and included no reasonable accommodation provision. § 20-14-301(a) is a policy statement regarding "equal rights and privileges" for those with physical disabilities with respect to public accommodations. Both in 1990 and today, these statutes did not explicitly cover state services, programs, and activities.
State policies favoring de-institutionalization	§ 20-47-214(c) (1979)	Both in 1990 and today, this statute applied only to involuntary commitment proceedings for persons with mental disorders found to pose a danger to themselves or others.

	CALIFORNIA	COMMENTS
Prohibits employment discrimination based upon disability	Calif. Gov't Code § 12940(a)	In 1990, statute did not cover those with mental illness. In 1990, statute did not cover those with "record of" (except for those diagnosed with cancer, § 12926(f)) or "regarded as" having a disability. § 12926(h).
Applicable to the State and other public employers	§ 12926(d)	
Applicable to the State pre-1990	§§ 12940(a), 12926(d) (1973)	
Equitable and monetary remedies available	§ 12960; 22 Cal. 4th 147, 166-167 (2000)	
State policies advancing the hiring of persons with disabilities	§§ 19230, 19232 (1977); Calif. Educ. Code § 44100 (1977)	

State policies requiring accessibility and accommodation	Gov't Code §§ 4450 (1968), 4450.5 (1984); Calif. Civ. Code §§ 54, 54.1 (1968), 51 (1905)	In 1990, bar against discrimination in public accommodations did not apply to those with mental impairments. In 1990, there was no bar against discrimination in provision of public services, programs, and activities. Cal. Gov't Code § 11135.
State policies favoring de-institutionalization	Calif. Welf. & Inst. Code §§ 5354 (1967), 5325.1 (1978)	Cal. Welf. & Inst. Code § 5354 deals solely with conservatorship proceedings for "gravely disabled persons."

	COLORADO	COMMENTS
Prohibits employment discrimination based upon disability	Colo. Rev. Stat. § 24-34-402(1)(a)-(b)	Both in 1990 and today, this statute did not cover mental disabilities. *See AT&T Techs., Inc.* v. *Royston*, 772 P.2d 1,182 (Colo. Ct. App. 1989).
Applicable to the State and other public employers	§ 24-34-401(3)	
Applicable to the State pre-1990	§§ 24-34-402(1)(a)-(b), 24-34-401(3) (1977)	
Equitable and monetary remedies available	§§ 24-34-306, 24-34-405	Both in 1990 and today, no compensatory damages were available.
State policies advancing the hiring of persons with disabilities	§§ 24-34-801 (1979), 26-8-105(d) (1963)	
State policies requiring accessibility and accommodation	§§ 9-5-101 to-104 (1965), 24-34-801 (1971), 24-34-601 (1971)	

State policies favoring de-institutionalization	§§ 27-10-101 (1973), 27-10.5-101 (1975)

CONNECTICUT*	COMMENTS	
Prohibits employment discrimination based upon disability	Conn. Gen. Stat. § 46a-60(1)	
Applicable to the State and other public employers	§§ 46a-51(10), 46a-69 to -78	
Applicable to the State pre-1990	§§ 46a-60(1), 46a-51(10); former §§ 4-61c to 4-61k (1973)	
Equitable and monetary remedies available	§ 46a-86(b)	Both in 1990 and today, statute did not provide for emotional distress damages nor for recovery of attorneys' fees. *See Bridgeport Hosp.* v. *Commission on Human Rights and Opportunities*, 653 A.2d 782 (Conn. 1995).

*Conn. Const. art. I, § 20 prohibits denial of equal protection of laws, discrimination and segregation based on physical or mental disability.

State policies advancing the hiring of persons with disabilities	§§ 46a-7 (1977), 46a-70(a) (1973), 31-136 (1957), 46a-70(b)-(c) (1973), 31-138 (1957)	
State policies requiring accessibility and accommodation	§§ 29-269 (1967), 29-271 (1975); § 46a-64 (1973)	In 1990, § 46a-64(b)(3) contained express exclusion of reasonable accommodation requirement.
State policies favoring de-institutionalization	§ 17a-498(c) (orig. § 17-178(c) (1976))	

	DELAWARE	COMMENTS
Prohibits employment discrimination based upon disability	Del. Code Title 19, § 724	
Applicable to the State and other public employers	§ 722(2)	
Applicable to the State pre-1990	§§ 724, 722(2) (1987)	
Equitable and monetary remedies available	§ 712(j),(k), and (g)	Both in 1990 and today, there were no compensatory damages available.
State policies advancing the hiring of persons with disabilities	Title 19 § 721 (1987); Title 16 § 9501(b) (1953)	Both in 1990 and today, § 9501(b) did not cover those with mental impairments.

State policies requiring accessibility and accommodation	Title 29 §§ 7301 to 7306; Title 16 § 9502 (1971); Title 6 § 4504	Both in 1990 and today, § 9502 limited protection to those with a physical disability. Both in 1990 and today, § 4504 contained no explicit obligation to make reasonable accommodations. Both in 1990 and today, under § 4504, there was no private right of action. Both in 1990 and today, these statutes did not explicitly cover state services, programs, and activities.
State policies favoring de-institutionalization	Title 16 § 5010 (1975)	Both in 1990 and today, statute applied only to involuntary civil commitment proceedings for mentally ill persons.

	FLORIDA	COMMENTS
Prohibits employment discrimination based upon disability	Fla. Stat. §§ 760.10, 110.105(2), 110.233(1)	In 1990, there was no accommodation requirement in employment. Also, an employer can discriminate against physically disabled person if disability "prevents the satisfactory performance of the work involved." § 413.08. Both in 1990 and today, § 110.105 prohibited discrimination in public employment unless "physical requirement constitutes a bona fide occupational qualification necessary to proper and efficient administration."
Applicable to the State and other public employers	§§ 760.02(6)-(7), 110.233(1), 110.105(2) (1977)	

Applicable to the State pre-1990	§§ 110.105(2), 760.10, 760.02(6)-(7), 110.233(1) (1977)	
Equitable and monetary remedies available	§§ 760.07, 760.11(5)	
State policies advancing the hiring of persons with disabilities	§ 413.08(3) (1971), § 413.393(1)(i) (1994)	In 1990, there was no state policy "advancing" the hiring of disabled persons, who could be refused employment if "disability prevents the satisfactory performance of the work involved." § 413.08. In 1990, there was no state policy "advancing" the hiring of persons with mental disabilities.

State policies requiring accessibility and accommodation	§ 553.503 (1974 (*see former* § 553.46)); § 413.08 (1949)	Both in 1990 and today, only those with physical disabilities had equal rights to public accommodations, but no requirement to modify or provide any service to a higher degree of accommodation than is required for a person without disability. § 413.08. Both in 1990 and today, these statutes did not explicitly cover services, programs or activities.
State policies favoring de-institutionalization	§ 394.467(1) (b) (1982)	Both in 1990 and today, this provision applied only to involuntary civil commitment proceedings for mentally ill persons who are dangerous or incapable of surviving with "available alternative services."

	GEORGIA	COMMENTS
Prohibits employment discrimination based upon disability	Ga. Code §§ 34-6A-4, 45-19-29	Both in 1990 and today, § 34-6A-4 limited coverage of mental impairments to mental retardation and learning disabilities. § 34-6A-2(7)(B). Both in 1990 and today, § 34-6A-4 did not cover those "regarded as" having a disability. § 34-6A-2(3). Both in 1990 and today, § 34-6A-4(a) contained explicit rejection of reasonable accommodation requirement.
Applicable to the State and other public employers	§§ 34-6A-2(2), 45-19-22(5) (1978)	
Applicable to the State pre-1990	§§ 34-6A-4, 34-6A-2(2), 45-19-29, 45-19-22(5) (1978)	
Equitable and monetary remedies available	§§ 34-6A-6, 45-19-38	

State policies advancing the hiring of persons with disabilities	§ 30-1-2 (1975)	
State policies requiring accessibility and accommodation	§§ 30-3-3 (1984), 30-4-1 (1955)	Both in 1990 and today, § 30-3-3 applied only to government buildings. Both in 1990 and today, § 30-4-1 limited coverage to those with physical impairments. Both in 1990 and today, these statutes did not explicitly cover public services, programs, and activities.
State policies favoring de-institutionalization	§ 37-3-162(a) (*see also* § 88-502.4 (1978))	Both in 1990 and today, these provisions were limited to the treatment of the mentally ill.

	HAWAII	COMMENTS
Prohibits employment discrimination based upon disability	Haw. Rev. Stat. §§ 78-2, 378-2(1)(A)	Both in 1990 and today, § 378-3(3) stated that employers may refuse to hire or discharge any individual "for reasons relating to the ability of the individual to perform the work in question."
Applicable to the State and other public employers	§§ 78-2, 378-1	
Applicable to the State pre-1990	§§ 378(2), 378-1, 78-2 (1980)	
Equitable and monetary remedies available	§ 378-5(b)	
State policies advancing the hiring of persons with disabilities	§ 78-2 (1967)	
State policies requiring accessibility and accommodation	§§ 103-50 (1965), 347-13 (1945), 489-3 (1986)	

State policies favoring de-institutionalization	§ 334-60.2(3) (orig. § 334-60 (1976))	Both in 1990 and today, this statute applied only to involuntary civil commitment proceedings for mentally ill persons who are dangerous or gravely disabled.

	IDAHO	COMMENTS
Prohibits employment discrimination based upon disability	Idaho Code § 67-5909(1)	
Applicable to the State and other public employers	§ 67-5902(6)(b)	
Applicable to the State pre-1990	§§ 67-5909(1), 67-5902(6)(b) (1988)	
Equitable and monetary remedies available	§§ 67-5907, 67-5908	
State policies advancing the hiring of persons with disabilities	§ 56-707(1) (1969)	
State policies requiring accessibility and accommodation	§§ 39-3201 to -3210 (1967), 56-702 (1969), 56-703 (1969)	Both in 1990 and today, these statutes did not cover mental disabilities. Both in 1990 and today, these statutes did not explicitly cover state services, programs, and activities.

State policies favoring de-institutionalization	§ 66-329(k)(2) (1981)	Both in 1990 and today, statute applied only to involuntary civil commitment proceedings for mentally ill persons who are dangerous or gravely disabled.

	ILLINOIS*	COMMENTS
Prohibits employment discrimination based upon disability	775 Ill. Comp. Stat. §§ 5/1-103(Q), 5/2-102(A)	Both in 1990 and today, statutory definition of handicap was limited to characteristics that were unrelated to ability to perform duties of particular job. § 5/1-103(l). Therefore, there is effectively no statutory accommodation requirement. Accommodation requirements in regulations do not include job reassignment.
Applicable to the State and other public employers	§§ 5/1-103(L)	
Applicable to the State pre-1990	§§ 5/1-103(L), (Q) (1979)	

*Ill. Const. art. I, § 19 prohibits employment discrimination against persons with physical or mental disabilities

Equitable and monetary remedies available	§ 5/8A-104	Both in 1990 and today, no private right of action until exhaust administrative procedures (file complaint with Department of Human Rights, appeal to Commission), and judicial review only for abuse of discretion.
State policies advancing the hiring of persons with disabilities	§§ 30/5 (1969), 5/1-102(A) (1980), 5/1-102 (F)-(G) (1980); 20 Ill. Comp. Stat. § 415/19a (1955), § 4007/1 (1992)	Both in 1990 and today, § 30/5 provided employment on same terms and conditions as able-bodied only for persons with physical disability, unless disability "prevents performance of the work involved." No coverage for those with mental or developmental disabilities.

State policies requiring accessibility and accommodation	410 Ill. Comp. Stat. § 2511 (1985); 775 Ill. Comp. Stat. §§ 30/3 (1969), 5/5-102 (1986)	Both in 1990 and today, 410 Ill. Comp. Stat. § 25 imposed minimum standards of accessibility only for persons with physical disabilities. There is no private right of action under this statute. § 30/3 contains no explicit obligation to make reasonable accommodations, and does not apply to those with mental or developmental disabilities.
State policies favoring de-institutionalization	405 Ill. Comp. Stat. § 5/3-811 (1979)	Both in 1990 and today, this statute applied only to involuntary civil commitment proceedings for dangerous mentally ill persons.

	INDIANA	COMMENTS
Prohibits employment discrimination based upon disability	Ind. Code § 22-9-5-19	§ 22-9-5-19 was not in effect in 1990. In 1990, the relevant statute was § 22-9-1-3 et seq. Both in 1990 and today, the definition of disability did not cover those with a "record of" or "regarded as" having a disability. § 22-9-1-3(r). Both in 1990 and today, there was no reasonable accommodation requirement. § 22-9-1-13.
Applicable to the State and other public employers	§§ 22-9-5-10, 22-9-5-15	
Applicable to the State pre-1990	§§ 22-9-1-3 (1975)	
Equitable and monetary remedies available	§§ 22-9-1-6(1), 22-9-1-17	Both in 1990 and today, § 22-9-1-17(c) prohibited the use of jury trials.

State policies advancing the hiring of persons with disabilities	§§ 16-32-3-1 (1969), 16-32-3-5 (1969), 22-9-1-2 (1975), 4-15-12-2 (1977)	
State policies requiring accessibility and accommodation	§§ 22-13-4-1(1) (1987), 16-32-3-1 (1969)	Both in 1990 and today, these statutes did not explicitly cover state services, programs, and activities.
State policies favoring de-institutionalization	§ 12-26-6-8 (orig. 16-14-9.1-9 (1975))	Both in 1990 and today, this statute applied only to involuntary civil commitment proceedings for dangerous mentally ill persons.

	IOWA	COMMENTS
Prohibits employment discrimination based upon disability	Iowa Code § 216.6(1)(a)	In 1990, employment discrimination statute was § 601A.6 (current version at § 216.6). Both in 1990 and today, the statutory definition of "disability" did not cover those with a "record of" (except for those with a positive HIV diagnosis) or "regarded as" having a disability.
Applicable to the State and other public employers	§ 216.2(7), (11)	
Applicable to the State pre-1990	§§ 216.2(7), (11), 216.6 (1)(a) (1972)	Inaccurate cite. In 1990, employment discrimination provision was found at § 610A.6.
Equitable and monetary remedies available	§§ 216.15, 216.16	

State policies advancing the hiring of persons with disabilities	§§ 216C.2 (1967), 216C.1 (1967), 19B.2 (1986), 19B.11 (1986)	
State policies requiring accessibility and accommodation	§§ 104A (1965), 216C.3 (1959), 213C.1, 213C.4 (1967), 216.7 (1972)	
State policies favoring de-institutionalization	§§ 229.14(3) (1975), 225C.14 (1981)	Both in 1990 and today, § 229.14 applied only to "seriously mentally impaired persons."

	KANSAS	COMMENTS
Prohibits employment discrimination based upon disability	Kan. Stat. § 44-1009(1)	In 1990, statute did not cover those with mental impairments. § 44-1002. In 1990, § 44-1002 did not cover those with a "record of" or "regarded as" having a disability.
Applicable to the State and other public employers	§ 44-1002(b)	
Applicable to the State pre-1990	§§ 44-1002(b), 44-1009(1) (1974)	
Equitable and monetary remedies available	§§ 44-1011, 44-1005(k)	Both in 1990 and today, § 44-1005(k) capped awards for emotional damages at $2,000.

State policies advancing the hiring of persons with disabilities	§§ 39-1105 (1969), 44-1001 (1974)	Both in 1990 and today, § 39-1105 applied only to those with a physical disability. In 1990, § 44-1001 applied only to those with a physical disability.
State policies requiring accessibility and accommodation	§§ 58-1301 (1968), 39-1101 (1969), 44-1009(c) (1974)	In 1990, § 58-1301 applied only to individuals with physical disabilities. Both in 1990 and today, § 39-1101 applied only to those with a physical disability and provided for no remedies for violations. In 1990, § 44-1009(c) also limited protection to those with a physical disability.
State policies favoring de-institutionalization	§ 59-2966 (orig. § 59-2917(f) (1976)); § 39-1603 (1990)	Both in 1990 and today, these statutes applied only to those with mental illness.

	KENTUCKY	COMMENTS
Prohibits employment discrimination based upon disability	Ky. Rev. Stat. §§ 207.150, 344.040	In 1990, § 344.040 did not apply to disabilities. In 1990, this statute did not cover those with mental disabilities or communicable diseases. §§ 207.130, 207.140(2). In 1990, this statute did not cover those with a "record of," or who were "regarded as" having, a disability. § 207.130. In 1990, there was no reasonable accommodation requirement. Both in 1990 and today, employer could discriminate if physical disability

		interfered with person's ability adequately to perform assigned job duties. Employer not required to modify physical facilities or exercise more caution for disabled person. § 207.150.
Applicable to the State and other public employers	§§ 207.130 (1), (3); 344.010, 344.030(2)	In 1990, §§ 344.010, 344.030(2) did not apply to disabilities.
Applicable to the State pre-1990	§§ 207.150, 207.130(1), (3) (1976)	
Equitable and monetary remedies available	§§ 207.210(3), (4), 344.230, 344.240, 344.450	In 1990, §§ 344.230, 344.240, 344.450 did not apply to disabilities. Both in 1990 and today, Department of Workplace Standards provided only injunctive relief. § 207.210.
State policies advancing the hiring of persons with disabilities	§§ 344.020(1)(b) (1992), 12.450 to 12.465 (1996)	In 1990, §§ 344.020 did not apply to disabilities. §§ 12.450-12.465 were not in effect in 1990.

State policies requiring accessibility and accommodation	§§ 198B.260 (1980), 258.500 (1966)	Both in 1990 and today, § 258.500 applied only to blind, deaf, and "mobility-impaired" persons with guide dogs. Both in 1990 and today, these statutes did not explicitly cover services, programs or activities.
State policies favoring de-institutionalization	§ 202A.026 (1982)	Both in 1990 and today, applied only to involuntary civil commitment proceedings for mentally ill persons found to pose a danger or threat of danger to themselves or others.

	LOUISIANA*	COMMENTS
Prohibits employment discrimination based upon disability	La. Rev. Stat. § 23.323(A)-(B)	§ 23.322 et seq. did not apply to employment discrimination in 1990. Both in 1990 and today, the definition of disability did not cover mental illness. § 46:2253 (1990), § 23:322 (2000). Both in 1990 and today, statute permits discrimination by employer based on any "cosmetic disfigurement" or "anatomical loss of body systems." § 46:2253(2) (1990), § 23:322(6) (2000). Both in 1990 and today, employer not required to make architectural modifications in excess of the amount allowed as a federal deduction.

*La. Const. art. I, § 12 prohibits public accommodations and public areas from discriminating based on "physical condition."

		§ 46:2253(19) (1990), § 23:322(9) (2000). Both in 1990 and today, private employers not required to incur "any additional costs in the hiring or the promotion of a [disabled] person." § 46:2253(19) (1990), § 23:322(9) (2000).
Applicable to the State and other public employers	§ 23:302(2)	
Applicable to the State pre-1990	§§ 46:2254(B)-(E), 46:2253 (1980)	
Equitable and monetary remedies available	§ 23:303	
State policies advancing the hiring of persons with disabilities	§ 51:2231.A (1992)	
State policies requiring accessibility and accommodation	§§ 40:1731 to 1743 (1977), 46:1953 (1975), 49:146 (1987)	Both in 1990 and today, § 49:146 was simply a policy of non-discrimination with no affirmative accommodation requirement.

State policies favoring de-institutionalization	§ 28:55.E(1) (1977)	Both in 1990 and today, this provision applied to involuntary civil commitment proceedings only for dangerous mentally ill persons.

	MAINE	COMMENTS
Prohibits employment discrimination based upon disability	Me. Rev. Stat. Title 5 § 4572.1	In 1990, this statute did not cover those with a "record of," or who were "regarded as" having, a disability. § 4553.
Applicable to the State and other public employers	§ 4553.4, .7	
Applicable to the State pre-1990	§§ 4572.1, 4553.4, .7 (1973)	
Equitable and monetary remedies available	§§ 4612, 4613	
State policies advancing the hiring of persons with disabilities	Title 26 § 2006.5-C (1969)	
State policies requiring accessibility and accommodation	Title 5 §§ 4593 to 4595 (1973); Title 17 § 1312 (1971); Title 25 § 2701 (1967)	In Title 17 § 1312, there is no explicit obligation to make reasonable accommodations except the right to use guide dogs. In 1990, these statutes did not explicitly cover services, programs or activities.

State policies favoring de-institutionalization	Title 34-B § 3864.5.E(2) (1983)	Both in 1990 and today, this provision applied to involuntary civil commitment proceedings for only mentally ill persons who pose a likelihood of serious harm.

	MARYLAND	COMMENTS
Prohibits employment discrimination based upon disability	Md. Ann. Code Art. 49B § 16	Both in 1990 and today, the statute did not cover those with a "record of," or "regarded as" having, a disability. § 15. Both in 1990 and today, employer could discriminate based on a disability that "reasonably preclude[s] the performance of the employment." § 16(a)(1).
Applicable to the State and other public employers	§§ 7, 15(b), 17A	
Applicable to the State pre-1990	§§ 7, 15(b), 16 (1974)	

Equitable and monetary remedies available	§ 11(e)	Both in 1990 and today, there was no private right of action beyond the administrative context. §§ 10, 11. Both in 1990 and today, no compensatory damages were available.
State policies advancing the hiring of persons with disabilities	Art. 30 § 33 (1966)	Both in 1990 and today, this policy was limited to the blind and deaf, and only encouraged employment "unless it is shown that the particular handicap prevents the performances of the work involved."
State policies requiring accessibility and accommodation	Md. Code Ann, State Fin. & Proc. § 2-509 (1985); Md. Ann. Code art. 83B § 6-102 (1974), art. 30 § 33 (1966), art. 49B § 5 (1974)	Both in 1990 and today, Art. 30 § 33 was limited to the blind and deaf. Both in 1990 and today, these statutes did not explicitly cover services, programs or activities.

State policies favoring de-institutionalization	Md. Health-Gen. § 10-632 (e)(2)(v) (1982)	Both in 1990 and today, this provision applied only to involuntary civil commitment proceedings for dangerous mentally ill persons.

MASSACHUSETTS*		COMMENTS
Prohibits employment discrimination based upon disability	Mass. Gen. Laws ch. 151B § 4(16)	
Applicable to the State and other public employers	§ 1(5)	
Applicable to the State pre-1990	§§ 1(5), 4(16) (1983)	
Equitable and monetary remedies available	§§ 5, 6	Both in 1990 and today, attorneys' fees were not available.
State policies advancing the hiring of persons with disabilities	ch. 6 § 105-106 (1958)	
State policies requiring accessibility and accommodation	ch. 22 § 13A (1967); ch. 143 § 3W (1973); ch. 272 §§ 92A, 98 (1975)	Both in 1990 and today, these statutes did not explicitly cover services, programs or activities.

*Mass. Const. Amendment art. 114 prohibits discrimination against persons with disabilities in a program or activity within the Commonwealth.

State policies favoring de-institutionalization	ch. 123 § 8 (1978)	Both in 1990 and today, this provision applied only to involuntary civil commitment proceedings for dangerous mentally ill persons.

	MICHIGAN	COMMENTS
Prohibits employment discrimination based upon disability	Mich. Comp. Laws §§ 37.1102, 37.1202	In 1990, these statutes did not cover those "regarded as" having an impairment. § 37.1103. In 1990, coverage for mental disabilities was limited to "mental retardation which is significantly subaverage general intellectual functioning and to a mentally ill restored condition." § 37.1103. In 1990, definition of handicap was limited to characteristics that were unrelated to ability to perform duties of particular job. § 37.1103. Therefore, there was effectively no reasonable accommodation requirement.

Applicable to the State and other public employers	§§ 37.1103(g), 37.1201(b)	
Applicable to the State pre-1990	§§ 37.1102, 37. 1103(g), 37.1202 (1976)	
Equitable and monetary remedies available	§§ 37.1606, 37.2605	
State policies advancing the hiring of persons with disabilities	Exec. Order No. 1994-16 (May 23, 1994)	In 1990, there were no policies advancing the hiring of persons with disabilities.

State policies requiring accessibility and accommodation	§§ 125.1351 to 1356 (1966), 37.1302 (1976), 37. 1102 (1976)	Both in 1990 and today, § 37.1302 granted only equal enjoyment of public accommodation, and only if disability "is unrelated to the individual's ability to utilize and benefit from the accommodations." Therefore, there is effectively no reasonable accommodation requirement. Both in 1990 and today, § 125.351 et seq. required accessibility only for "physically limited" persons.
State policies favoring de-institutionalization	§ 330.1469a (1974)	Both in 1990 and today, this provision applied only to civil commitment proceedings for mentally ill persons, and only where no less restrictive alternatives are available.

	MINNESOTA	COMMENTS
Prohibits employment discrimination based upon disability	Minn. Stat. § 363.03	In 1990, forms of reasonable accommodations did not include job reassignment.
Applicable to the State and other public employers	§ 363.01(17), (28)	
Applicable to the State pre-1990	§§ 363.03, 363.01 (1973)	
Equitable and monetary remedies available	§ 363.071	
State policies advancing the hiring of persons with disabilities	§ 256C.01 (1969), § 116J.874	Both in 1990 and today, § 256C.01 applied only to persons with physical disabilities. § 116J.874 was not in effect in 1990.

State policies requiring accessibility and accommodation	§§ 471.465 to .468 (1971), 256C.02 (1969), 363.03 (1975)	Both in 1990 and today, § 256C.02 applied only to persons with physical disabilities, and contained no explicit obligation to make reasonable accommodations except for use of service dogs.
State policies favoring de-institutionalization	§ 253B.09 (1982)	Both in 1990 and today, this provision applied only to involuntary civil commitment proceedings for mentally ill persons.

	MISSISSIPPI	COMMENTS
Prohibits employment discrimination based upon disability	Miss. Code § 25-9-149*	§ 25-9-149 is merely a policy statement. Both in 1990 and today, there was no coverage for persons with mental disabilities. § 43-6-15. Both in 1990 and today, there was no coverage for those with a "record of" or "regarded as having" a disability. § 43-6-15. Both in 1990 and today, employers could discriminate if "disability shall materially affect the performance of the work required by the job." Therefore, there was no reasonable accommodation requirement. § 43-6-15.

*Only applicable to persons seeking public employment

Applicable to the State and other public employers	§ 25-9-149	
Applicable to the State pre-1990	§ 25-9-149 (1984)	
Equitable and monetary remedies available	§§ 25-9-131, 25-9-132	Both in 1990 and today, there were no monetary remedies available.
State policies advancing the hiring of persons with disabilities	§ 43-6-15 (1974)	Both in 1990 and today, this policy applied only to persons with physical disability.
State policies requiring accessibility and accommodation	§§ 43-6-101 to -124 (1972), 43-6-5 (1972)	Both in 1990 and today, these statutes did not explicitly cover services, programs or activities.
State policies favoring de-institutionalization	§ 41-21-73(4) (orig. § 41-21-75 (1975))	Both in 1990 and today, this provision applied only to involuntary civil commitment proceedings for mentally ill persons.

	MISSOURI	COMMENTS
Prohibits employment discrimination based upon disability	Mo. Rev. Stat. § 213.055(1)	
Applicable to the State and other public employers	§ 213.010(7)	
Applicable to the State pre-1990	§§ 213.010(7), 213.055(1) (1978)	
Equitable and monetary remedies available	§ 213.076	Both in 1990 and today, there was no right to a jury trial. § 213.111.
State policies advancing the hiring of persons with disabilities	§§ 209.180 (1977), 286.200 (1977)	Both in 1990 and today, § 209.180 applied only to those with a visual disability.
State policies requiring accessibility and accommodation	§§ 8.610 to .657 (1967), 209.150 (1941), 213.065 (1986)	Both in 1990 and today, § 209.150 addressed the rights of only those with a physical disability, and only affirmative obligation was right to use guide dog.

State policies favoring de-institutionalization	§ 632.335.4 (1980)	Both in 1990 and today, this statute applied only to involuntary civil commitment proceedings for mentally ill persons who are likely to cause serious harm to self or others.

	MONTANA	COMMENTS
Prohibits employment discrimination based upon disability	Mont. Code §§ 49-2-303, 49-4-101, 49-3-201	In 1990, the definition of "disability" did not cover those with a "record of" or "regarded as" having an impairment. §§ 49-2-101, 49-3-101, 39-30-103. In 1990, there was no reasonable accommodation requirement. § 49-2-101. Both in 1990 and today, § 49-4-101 prohibited discrimination only against persons with physical disabilities.
Applicable to the State and other public employers	§ 49-3-201	
Applicable to the State pre-1990	§ 49-3-201 (1975)	
Equitable and monetary remedies available	§§ 49-2-506(b), 49-4-102, 49-3-309(b)	Both in 1990 and today, no private right of action until exhaust administrative remedies. § 49-2-509.

State policies advancing the hiring of persons with disabilities	§§ 49-4-202 (1971), 49-3-202 (1975), 39-30-101 to 102, -106 (1983); Mont. Admin. R. §§ 2.21.1412 to .1414 (1984)	Both in 1990 and today, § 49-4-202 did not apply to mental disabilities. This policy encouraged only the hiring of those with physical disabilities "on the same terms and conditions as the able-bodied, unless it is shown that the particular disability prevents the performance of the work involved."
State policies requiring accessibility and accommodation	Mont. Code §§ 50-60-201(4) (1969), 49-4-211 (1971), 49-2-304 (1974)	Both in 1990 and today, § 49-2-304 prohibited discrimination based on disability unless "distinction is based on reasonable grounds."
State policies favoring de-institutionalization	§ 53-21-127 (1975)	Both in 1990 and today, this provision applied only to civil commitment proceedings for mentally ill persons.

	NEBRASKA	COMMENTS
Prohibits employment discrimination based upon disability	Neb. Rev. Stat. §§ 48-1104, 48-1107.02	In 1990, these statutes did not cover those with a "record of" or "regarded as" having a disability. § 48-1102. In 1990, employer not required to provide accommodation unless it could be done at "de minimis expense" (§ 48-1102(8)).
Applicable to the State and other public employers	§§ 48-1102(2), 48-1126	
Applicable to the State pre-1990	§§ 48-1104, 48-1102(2) (1979)	
Equitable and monetary remedies available	§ 48-1119(4)	In 1990, no compensatory damages were available.
State policies advancing the hiring of persons with disabilities	§ 20-131 (1971)	Both in 1990 and today, State policy only for the employment of disabled persons "on the same terms and conditions as persons without disabilities."

State policies requiring accessibility and accommodation	§§ 81-5, 147 (1974), 20-127 (1971), 20-129 (1971)	Both in 1990 and today, in § 20-127, there was no explicit obligation to make reasonable accommodations. In 1990, § 81-5,147 did not relate to accessibility or accommodation requirements. Both in 1990 and today, these statutes did not explicitly cover services, programs or activities.
State policies favoring de-institutionalization	§ 83-1037 (1976)	Both in 1990 and today, applied only to involuntary civil commitment proceedings for dangerous mentally ill persons.

	NEVADA	COMMENTS
Prohibits employment discrimination based upon disability	Nev. Rev. Stat. §§ 281.370, 613.330	In 1990, the definition of "disability" in these statutes did not cover mental disabilities. In 1990, the definition of "disability" in these statutes did not cover those with a "record of" or "regarded as" having a disability. In 1990, there was no reasonable accommodation requirement. In 1990, employers could discriminate based upon a bona fide occupational qualification or if physical condition "would prevent proper performance of the work." § 613.350.
Applicable to the State and other public employers	§§ 281.370, 613.310(2), (5)	
Applicable to the State pre-1990	§§ 281.370, 613.330, 613.310(2), (5) (1971)	

Equitable and monetary remedies available	§§ 613.405, 613.420, 613.430, 233.170, 233.180	Both in 1990 and today, actual damages were not available in administrative procedures, and recovery for backpay was limited to two years after the most recent unlawful practice. § 233.170. Both in 1990 and today, private right of action only if Equal Rights Commission dismisses complaint. § 613.420.
State policies advancing the hiring of persons with disabilities	§ 284.012 (1969)	In 1990, this policy did not apply if "the particular disability prevents the proper performance of the work involved."
State policies requiring accessibility and accommodation	§§ 338.180 (1973), 651.070 (1969)	Both in 1990 and today, § 338.180 requires accessibility only if there is no "loss of function, space or facility where the general public is concerned." Both in 1990 and today, there was no explicit obligation to make reasonable accommodations. § 651.070. In 1990, provisions related to public services did not cover mental impairments.

State policies favoring de-institutionalization	§ 433A.310.3 (1975)	Both in 1990 and today, this provision applied only to involuntary civil commitment proceedings for dangerous mentally ill persons.

	NEW HAMPSHIRE	COMMENTS
Prohibits employment discrimination based upon disability	N.H. Rev. Stat. § 354-A:7	In 1990, there was no coverage for persons with mental illness. § 354-A:3. In 1990, there was no coverage for those with "record of" or "regarded as having" disability. § 354-A:3. Both in 1990 and today, there was no reasonable accommodation requirement. § 354-A:8 (1990), § 354-A:7 (2000).
Applicable to the State and other public employers	§ 354-A:2(VII)	
Applicable to the State pre-1990	§§ 354-A:2, 354-A:7 (1975)	
Equitable and monetary remedies available	§ 354-A:22	Both in 1990 and today, complainant must exhaust administrative remedies prior to seeking judicial review.

State policies advancing the hiring of persons with disabilities	§ 167-C:5 (1971)	Both in 1990 and today, this policy applied only to persons with physical disability.
State policies requiring accessibility and accommodation	§§ 275-C:14 (1977), 167-C:2 (1971), 155:39-b (1990)	In § 167-C:2, there is no explicit obligation to make reasonable accommodations.
State policies favoring de-institutionalization	§§ 135-C:57 (1986), 135C:40(v) (1975)	

	NEW JERSEY	COMMENTS
Prohibits employment discrimination based upon disability	N.J. Stat. Title 10 §§ 5-4.1, 5-12, 5-29.1	
Applicable to the State and other public employers	§ 5-5.e	
Applicable to the State pre-1990	§§ 5-4.1, 5-12, 5-29.1 (1972)	
Equitable and monetary remedies available	§ 5-13	
State policies advancing the hiring of persons with disabilities	§§ 30:6-17 (1964), 30:6-23 (1982), 11A:7-1 (1986)	
State policies requiring accessibility and accommodation	§§ 52:32-4 to –5 (1971), 10:5-4 (1972), 10:5-29 (1971)	

State policies favoring de-institutionalization	§§ 30:4-24.2(e) (1975), 30:4-27.11(e)(b) (1991), 30:6D-9 (1977)	Both in 1990 and today, § 30:4-24.2(e) applied only to persons with mental disability. Both in 1990 and today, § 30:6D-9 applied only to persons with developmental disabilities.

	NEW MEXICO	COMMENTS
Prohibits employment discrimination based upon disability	N.M. Stat. § 28-1-7	
Applicable to the State and other public employers	§ 28-1-2.A to .B	
Applicable to the State pre-1990	§§ 28-1-7, 28-1-2.A to .B (1973)	
Equitable and monetary remedies available	§ 28-1-10.J	Both in 1990 and today, this provision did not specify which remedies were available.
State policies advancing the hiring of persons with disabilities	§§ 28-7-7 (1967), 28-10-11 (1969), 28-10-1, 28-10-2 (1973)	Both in 1990 and today, § 28-7-7 applied only to the those with physical disability.
State policies requiring accessibility and accommodation	§§ 60-13-44(D) (1967), 28-7-3 (1967), 28-1-7(F) (1973)	

State policies favoring de-institutionalization	§ 43-1-11(c)(3) (1977)	Both in 1990 and today, this statute applied only to involuntary civil commitment proceedings for mentally ill persons who pose a likelihood of serious harm.

	NEW YORK	COMMENTS
Prohibits employment discrimination based upon disability	N.Y. Exec. Law § 296; N.Y. Civ. Serv. Law § 55	Both in 1990 and today, § 296 did not cover those with a "record of" or "regarded as" having a disability. § 292(21)(a). Both in 1990 and today, § 55 did not cover mental impairments.
Applicable to the State and other public employers	N.Y. Exec. Law § 292;* N.Y. Civ. Serv. Law § 55	
Applicable to the State pre-1990	N.Y. Exec. Law §§ 292, 296; N.Y. Civ. Serv. Law § 55 (1974)	
Equitable and monetary remedies available	N.Y. Exec. Law § 297(4)(c), (6), (9)	

**See Matter of Bd. of Higher Educ.* v. *Carter*, 14 N.Y.2d 138, 147 (1964).

State policies advancing the hiring of persons with disabilities	N.Y. Ct. Rules § 25.16 L. 1988 c. 261 § 62 (1988); N.Y. Civ. Serv. Law § 55-b (1977)
State policies requiring accessibility and accommodation	N.Y. Pub. Bldgs. Law §§ 50, 51 (1972); N.Y. Exec. Law § 296(2) and (2-a) (1974); N.Y. Civ. Rights Law § 47 (1976)
State policies favoring de-institutionalization	N.Y. Mental Hygiene Law § 9.27(d) (orig. § 31.27) (1972)

	NORTH CAROLINA	COMMENTS
Prohibits employment discrimination based upon disability	N.C. Gen. Stat. §§ 126-16, 168A-5	Both in 1990 and today, reasonable accommodation not required if cost of making changes over the course of disabled person's employment would exceed 5% of the employee's annual salary or annualized hourly wage. § 168A-3.
Applicable to the State and other public employers	§§ 126-16, 168A-3(2),(7)	
Applicable to the State pre-1990	§§ 168A-3(2),(7), 168A-5 (1985)	
Equitable and monetary remedies available	§§ 126-37, 168A-11	Both in 1990 and today, § 168A-11 provided for only declaratory or injunctive relief and backpay.

State policies advancing the hiring of persons with disabilities	§§ 143-422.2 (1977), 128-15.3 (1971), 168A-2 (1985), 128-15.3 (1971), 143B-403.1 to 403.2 (1977)	
State policies requiring accessibility and accommodation	§§ 168-2 (1973), 168-3 (1973), 168A-6 (1985)	
State policies favoring de-institutionalization	§ 122C-271 (1973)	Both in 1990 and today, § 122C-271 applied only to involuntary civil commitment proceedings for dangerous mentally ill or retarded persons.

	NORTH DAKOTA	COMMENTS
Prohibits employment discrimination based upon disability	N.D. Cent. Code § 14-02.4-03	
Applicable to the State and other public employers	§§ 14-02.4-02.6, 14-02.4-02.11	
Applicable to the State pre-1990	§§ 14-02.4-03, 14-02.4-02.6 (1983)	
Equitable and monetary remedies available	§§ 14-02.4-19 to -20	Both in 1990 and today, only injunctive relief and backpay were available.
State policies advancing the hiring of persons with disabilities	§ 25-13-05 (1967)	Both in 1990 and today, this policy applied only to persons with physical disabilities.
State policies requiring accessibility and accommodation	§§ 14-02.4-14 (1983), 25-13-02 (1967), 48-02-19 (1973)	Both in 1990 and today, § 25-13-02 applied only to the use of guide dogs.

State policies favoring de-institutionalization	§ 25-03.1-17 (1977)	Both in 1990 and today, this statute applied only to involuntary civil commitment proceedings for mentally ill persons who pose a serious risk of harm to self or others. Both in 1990 and today, the state was not required to create a less restrictive treatment program or facility. § 25-03.3-13.

	OHIO	COMMENTS
Prohibits employment discrimination based upon disability	Ohio Rev. Code § 4112.02	
Applicable to the State and other public employers	§§ 4112.01(A) (1)-(2)	
Applicable to the State pre-1990	§ 4112.01, .02 (1976)	
Equitable and monetary remedies available	§ 4112.02(N)	§ 4112.02(N) relates only to age discrimination claims. Both in 1990 and today, there was no right to a jury trial for suit against state.
State policies advancing the hiring of persons with disabilities	§§ 3304.38 (1996), 124.231(C) (1978)	
State policies requiring accessibility and accommodation	§§ 3781.111 (1965), 4112.02 (1976)	Both in 1990 and today, these statutes did not cover services, programs, or activities of public entities.

State policies favoring de-institutionalization	§ 5122.15(E) (1977)	Both in 1990 and today, this statute applied only to involuntary commitment of mentally ill persons who pose substantial risk of harm to self or others.

	OKLAHOMA	COMMENTS
Prohibits employment discrimination based upon disability	Okla. Stat. Title 25 § 1302, 74 § 840-2.9.A	In 1990, there was no reasonable accommodation requirement. § 1302.
Applicable to the State and other public employers	25 § 1301.1; 74 § 840-2.9.A	
Applicable to the State pre-1990	25 §§ 1301.1, 1302; 74 § 840-2.9.A (1981)	
Equitable and monetary remedies available	25 § 1901	
State policies advancing the hiring of persons with disabilities	74 § 9.30 (1957)	
State policies requiring accessibility and accommodation	61 § 11 (1965); 7 § 19.1 (1968); 25 § 1402 (1985)	
State policies favoring de-institutionalization	43A, § 5-416 (orig. 54.9(A), § 405(B)(1) (1980))	

	OREGON	COMMENTS
Prohibits employment discrimination based upon disability	Or. Rev. Stat. § 659.436	
Applicable to the State and other public employers	§§ 659.400(4), 659.010(6)	
Applicable to the State pre-1990	§ 659.425 (renumbered in 1997) (1973)	
Equitable and monetary remedies available	§§ 659.050 to .070	
State policies advancing the hiring of persons with disabilities	§§ 182.100 (1981), 410.710 (1989), 659.020 (1983), 659.025(2) (1981), 659.405 (1973)	
State policies requiring accessibility and accommodation	§§ 447.210 to 310 (1971), 346.610 to 660 (1967), 659.425(3) (1973)	In 1990, these statutes did not explicitly cover services, programs or activities.

State policies favoring de-institutionalization	§§ 427.031 (1979), 427.007 (1981)	Both in 1990 and today, these statutes applied only to those with mental retardation or other developmental disabilities.

PENNSYLVANIA COMMENTS

Prohibits employment discrimination based upon disability	43 Pa. Cons. Stat. § 955	
Applicable to the State and other public employers	§ 954(b)	
Applicable to the State pre-1990	§§ 955, 954(b) (1974)	
Equitable and monetary remedies available	§§ 962(c), 959	There is no right to a jury trial. *Wertz* v. *Chapman*, 741 A.2d 1272, 1274-79 (Pa. 1999).
State policies advancing the hiring of persons with disabilities	§ 952 (1974), 62 Pa. Cons. Stat. § 3207(d) (1994)	
State policies requiring accessibility and accommodation	71 Pa. Cons. Stat. §§ 1455.1 to 1455.3b (1965); 43 Pa. Cons. Stat. § 955(i) (1974)	Both in 1990 and today, statutes did not explicitly cover services, programs or activities.

State policies favoring de-institutionalization	50 § 7304(f) (1976)	Both in 1990 and today, this statute applied only to involuntary civil commitment of severely mentally disabled persons who pose clear and present danger to self or others.

	RHODE ISLAND*	COMMENTS
Prohibits employment discrimination based upon disability	R.I. Gen. Laws §§ 28-5-7, 36-4-50	
Applicable to the State and other public employers	§§ 28-5-6(6)(i), 36-4-50	
Applicable to the State pre-1990	§§ 28-5-7, 28-5-6(6)(i) (1973)	
Equitable and monetary remedies available	§ 28-5-24	In 1990, compensatory damages were not available.
State policies advancing the hiring of persons with disabilities	§§ 28-5.1-9 (1988), 25-2-13 (1971), 42-51-1 to 42-51-10 (1970)	
State policies requiring accessibility and accommodation	§§ 37-8-15 (1964), 40-9.1-1 (1975), 42-87-2 (1983)	In 1990, these statutes did not explicitly cover services, programs or activities.

*R.I. Const. art. I, § 2 prohibits State entities and those doing business in the State from discriminating against an otherwise qualified person solely based on disability.

State policies favoring de-institutionalization	§ 40.1-5-8(j) (orig. § 40.1-5-8(10)) (1974)	Both in 1990 and today, statute applied only to involuntary civil commitment proceedings for mentally ill persons who pose likelihood of serious harm.

	SOUTH CAROLINA	COMMENTS
Prohibits employment discrimination based upon disability	S.C. Code §§ 1-13-80(A), 1-13-85	In 1990, there was no reasonable accommodation requirement.
Applicable to the State and other public employers	§§ 1-13-30 (d),(e)	
Applicable to the State pre-1990	§§ 1-13-80(A), 1-13-30(d)-(e) (1983)	
Equitable and monetary remedies available	§§ 1-13-90(c)(16), 1-13-90(d)(9)	In 1990 and today, actual damages capped at $5,000. §§ 43-33-540, -550.
State policies advancing the hiring of persons with disabilities	§ 43-33-60 (1962)	Both in 1990 and today, this policy applied only to those with physical disabilities.
State policies requiring accessibility and accommodation	§§ 10-5-250 to 10-5-320 (1962), 10-5-330 (1983), 43-33-20 (1962), 43-33-10 (1962), 43-33-530 (1983)	

State policies favoring de-institutionalization	§§ 44-20-20 (1990), 44-20-390 (1990)	Both in 1990 and today, applied only to those with mental retardation or with head and spinal injuries who pose likelihood of serious harm or lack sufficient capacity to make responsible decisions regarding treatment.

	SOUTH DAKOTA	COMMENTS
Prohibits employment discrimination based upon disability	S.D. Laws Codified §§ 20-13-10, 20-13-23.7, 20-13-10.1, 3-6A-15	In 1990, statute did not cover those "regarded as" having a disability. § 20-13-1.
Applicable to the State and other public employers	§§ 20-13-1(7), (11), 3-6A-15	
Applicable to the State pre-1990	§§ 20-13-10, 20-13-1(7) (1986)	
Equitable and monetary remedies available	§ 20-13-35.1	In 1990, there was no right to civil action and no compensatory damages available.
State policies advancing the hiring of persons with disabilities	§§ 20-13-23.7 (1986), 60-7-2 (1967)	
State policies requiring accessibility and accommodation	§§ 5-14-12 to 14 (1965), 9-46-1.2 (1975), 20-13-23.2 (1976), 20-13-23 (1986)	

State policies favoring de-institutionalization	§ 27A-10-9.1 (1991); *former* §§ 27A-9-16.1 (1981), 27A-12-3.6 (1975)	Both in 1990 and today, these statutes applied only to involuntary civil commitment proceedings for dangerous mentally ill persons.

	TENNESSEE	COMMENTS
Prohibits employment discrimination based upon disability	Tenn. Code § 8-50-103(a)	In 1990, this statute did not cover those with a "record of" or "regarded as" having a disability. In 1990, statute provided no reasonable accommodation requirement.
Applicable to the State and other public employers	§ 8-50-103(a)	
Applicable to the State pre-1990	§ 8-50-103(a) (1976)	
Equitable and monetary remedies available	§§ 4-21-311, 8-50-103(b)(2)	Both in 1990 and today, § 4-21-311 applied only to remedies available in housing discrimination cases.
State policies advancing the hiring of persons with disabilities	§§ 71-4-202 (1972), 8-50-104 (1976)	

State policies requiring accessibility and accommodation	§§ 68-120-201 to 205 (1970), 62-7-112 (1955)	Both in 1990 and today, these statutes did not explicitly cover services, programs or activities.
State policies favoring de-institutionalization	§ 33-6-104(b) (orig. § 33-604(a)) (1976)	Both in 1990 and today, applied only to involuntary civil commitment proceedings for mentally ill persons who pose likelihood of serious harm.

	TEXAS	COMMENTS
Prohibits employment discrimination based upon disability	Tex. Lab. Code § 21.051	In 1990, this statute did not cover those "regarded as" having a disability.
Applicable to the State and other public employers	§ 21.002(8)(D)	
Applicable to the State pre-1990	§§ 21.051, 21.002 (1983)	
Equitable and monetary remedies available	§ 21.258	In 1990, only equitable relief available; no compensatory damages were available.
State policies advancing the hiring of persons with disabilities	Tex. Hum. Res. §§ 122.001 (1975), 121.003, 121.001 (1979)	
State policies requiring accessibility and accommodation	Rev. Civ. Stat. Ann. art. 9102 (1979); Hum. Res. Code § 121.003 (1979)	Both in 1990 and today, these statutes did not explicitly cover services, programs or activities.

State policies favoring de-institutionalization	Tex. Health & Safety Code § 574.036 (d) (1983)	Both in 1990 and today, this statute applied only to involuntary civil commitment proceedings for mentally ill persons who pose serious risk of harm or cannot provide for own basic needs.

	UTAH	COMMENTS
Prohibits employment discrimination based upon disability	Utah Code § 34A-5-106	In 1990 and today, this statute did not cover those with a "record of" or "regarded as" having a disability. § 34-35-2(9) (1990), § 34A-5-102(5) (1999). In 1990, there was no reasonable accommodation requirement. § 34-35-6.
Applicable to the State and other public employers	§ 34A-5-102(8)(a)	
Applicable to the State pre-1990	§§ 34A-5-102, 34A-5-106 (1979)	
Equitable and monetary remedies available	§ 34A-5-107(A)	Both in 1990 and today, compensatory damages were not available. § 34-35-7.1(9), (15) (1990), § 34A-5-107(9) (1999). *See Barton* v. *Exam Ctr. Indus. and Gen. Med. Clinic, Inc.*, 994 P.2d 1261, 1267 (Utah 2000).

State policies advancing the hiring of persons with disabilities	§§ 26-30-3 (1981), 53A-24-114 (1995)	
State policies requiring accessibility and accommodation	§§ 26-29-1 to 4 (1981), 26-30-1 (1981)	Both in 1990 and today, these statutes did not explicitly cover services, programs or activities.
State policies favoring de-institutionalization	§ 62A-12-234 (10)(d) (orig. § 64-7-36(10)(d)) (1975)	Both in 1990 and today, this statute applied only to involuntary civil commitment proceedings for dangerous mentally ill persons.

	VERMONT	COMMENTS
Prohibits employment discrimination based upon disability	Vt. Stat. 21 § 495(a)(1)	
Applicable to the State and other public employers	§ 495d(1)	
Applicable to the State pre-1990	§§ 495, 495d (1981)	
Equitable and monetary remedies available	§ 495b(b)	
State policies advancing the hiring of persons with disabilities	Title 21 §§ 497 (1963), 497a (1963)	
State policies requiring accessibility and accommodation	Title 21 §§ 273-276 (1987); Title 9 § 4502 (b)-(c) (1987)	In 1990, there was no explicit obligation to make reasonable accommodations.
State policies favoring de-institutionalization	Title 18 § 7617(c) (1977)	Both in 1990 and today, statute applied only to involuntary civil commitment proceedings for dangerous mentally ill persons.

	VIRGINIA	COMMENTS
Prohibits employment discrimination based upon disability	Va. Code §§ 51.5-41.A, 2.1-716, 2.1-116.06	Both in 1990 and today, statutes did not cover those "regarded as" having a disability. § 51.5-3.
Applicable to the State and other public employers	§§ 51.5-41.A, 2.1-116.06	
Applicable to the State pre-1990	§§ 51.5-41.A, 2.1-716 (1985)	
Equitable and monetary remedies available	§§ 51.5-46, 2.1-116.07.B	Both in 1990 and today, relief excluded compensatory damages for pain and suffering.
		Both in 1990 and today, backpay limited to 180 days prior to the filing of a complaint.
State policies advancing the hiring of persons with disabilities	§§ 2.1-715 (1987), 2.1-116.10 (1979), 51.5-41.B (1972), 2.1-116.14 (1979)	

State policies requiring accessibility and accommodation	§§ 2.1-516 (1970), 51.5-44 (1972); 2.1-715 (1987)	Both in 1990 and today, these statutes contained no explicit obligation to make reasonable accommodation. Both in 1990 and today, these statutes did not explicitly cover services, programs or activities.
State policies favoring de-institutionalization	§ 37.1-67.3 (1976)	Both in 1990 and today, statute applied only to involuntary civil commitment proceedings for mentally ill persons who pose likelihood of serious harm or are substantially unable to take care of self.

WASHINGTON COMMENTS

Prohibits employment discrimination based upon disability	Wash. Rev. Code § 49.60.180	
Applicable to the State and other public employers	§ 49.60.040 (1), (3)	
Applicable to the State pre-1990	§§ 49.60.180, 49.60.040 (1), (3) (1973)	
Equitable and monetary remedies available	§ 49.60.250	Compensatory damages in administrative proceedings were capped at $1,000 in 1990, and $10,000 today.
State policies advancing the hiring of persons with disabilities	§§ 70.84.080 (1969), 70.84.010 (1969), 49.60.010 (1973), 50.12.250 (1987)	

State policies requiring accessibility and accommodation	§§ 19.27.031 (5) (1985), 70.92.110 (1975), 70.84.010 (1969)	
State policies favoring de-institutionalization	§§ 71.05.320 (1973), 17.24.015 (1989)	Both in 1990 and today, applied only to involuntary civil commitment proceedings for mentally ill persons who pose likelihood of serious harm or are gravely disabled.

	WEST VIRGINIA	COMMENTS
Prohibits employment discrimination based upon disability	W.Va. Code § 5-11-9	
Applicable to the State and other public employers	§ 5-11-3(d)	
Applicable to the State pre-1990	§§ 5-11-9, 5-11-3(d) (1973)	
Equitable and monetary remedies available	§§ 5-11-13(b), (c)	Both in 1990 and today, only incidental compensatory damages (the modern equivalent of $1,000 in 1977) were available in administrative proceedings.
State policies advancing the hiring of persons with disabilities	§§ 5-15-7 (1969), 5A-3A-1 (1990)	
State policies requiring accessibility and accommodation	§§ 5-11-2 (1981), 5-15-4 (1969), 5-11-9(6) (1973)	

State policies favoring de-institutionalization	§§ 27-5-3(a) (1979), 27-5-4(j)(2) (1979)	Both in 1990 and today, applied only to involuntary civil commitment proceedings for mentally ill persons who pose likelihood of serious harm.

	WISCONSIN	COMMENTS
Prohibits employment discrimination based upon disability	Wis. Stat. §§ 111.321-.322, 111.34	
Applicable to the State and other public employers	§ 111.32(6)(a)	
Applicable to the State pre-1990	§§ 111.321-.322, 111.32(6)(a), 111.34 (1965)	
Equitable and monetary remedies available	§ 111.39(c)	Both in 1990 and today, there were no compensatory damages available.
State policies advancing the hiring of persons with disabilities	§ 230.01(2) (1977); 1989 Act 345 § 1 (1989); Wis. Admin. Code ER-MRS 27.03(1), 27.04(1), 27.05(1) (1988)	
State policies requiring accessibility and accommodation	§§ 101.13 (1963), 346.503 (1981), 174.056 (1967)	

State policies favoring de-institutionalization	§ 51.20(13)(c) (1975)	Both in 1990 and today, applied only to involuntary civil commitment proceedings for dangerous mentally ill persons.

	WYOMING	COMMENTS
Prohibits employment discrimination based upon disability	Wyo. Stat. § 27-9-105(a)	
Applicable to the State and other public employers	§ 27-9-102(b)	
Applicable to the State pre-1990	§§ 27-9-102(b), 27-9-105(a) (1985)	
Equitable and monetary remedies available	§ 27-9-106(g)	
State policies advancing the hiring of persons with disabilities	§§ 27-1-110 to -111 (1967), 9-2-115 (1965)	
State policies requiring accessibility and accommodation	§§ 16-6-501 to 504 (1969), 35-13-201 (1967)	Both in 1990 and today, these statutes did not explicitly cover services, programs or activities.

State policies favoring de-institutionalization	§ 25-10-110(j) (1981)	Both in 1990 and today, applied only to involuntary civil commitment proceedings for mentally ill persons who pose imminent threat of physical harm.

(18)

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IN THE

Supreme Court of the United States

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA
and THE ALABAMA DEPARTMENT OF YOUTH SERVICES,

Petitioners,

—v.—

PATRICIA GARRETT and MILTON ASH,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENTS PATRICIA GARRETT AND MILTON ASH

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Dated August 11, 2000

46 pp

QUESTION PRESENTED

Do Title I and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213, exceed Congress' enforcement authority under Section 5 of the Fourteenth Amendment?

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INTEREST OF *AMICUS CURIAE*

The American Bar Association ("ABA") is the leading national membership organization of the legal profession with more than 404,000 members.[1] Its members include attorneys in private practice, attorneys for non-profit organizations and corporations, prosecutors and public defenders, legislators, law professors, and students, as well as non-lawyer associates in related fields.

The ABA has an interest in this case because the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1994) ("ADA"), is a critical piece of civil rights legislation that provides recourse for those discriminated against on the basis of disability. The ABA has a long-standing commitment to equality under the law, and has expressed strong support for federal legislation to address discrimination against people with disabilities, including the ADA. Further, many ABA members with disabilities have a direct interest in the continued viability of the ADA as a shield against discrimination. One of the ten goals of the ABA is "to promote full and equal participation in the legal profession by minorities, women and persons with disabilities."

Indeed, as early as 1945, the ABA created its Special Committee on the Rights of the Mentally Ill. This committee was the predecessor to the Commission on the

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, *amicus curiae* discloses that no part of this brief was authored by counsel for a party in this action, nor did any person or entity make a monetary contribution to the preparation or submission of this brief, and letters of consent are on file with the Clerk of the Court.

Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the position in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

Mentally Disabled, which the ABA established in 1973 and which became the ABA Commission on Mental and Physical Disability Law (the "Commission") upon the passage of the ADA. In 1976, the ABA began publishing what is now called the *Mental and Physical Disability Law Reporter*, currently the most exhaustive publicly available periodical on disability law.[2] Over time, the ABA has undertaken numerous initiatives to correct significant abuses by states in denying equal opportunities to people with disabilities. These have included promoting legislative and regulatory reform and monitoring mental health institutions. For example, in both 1976 and 1978, the ABA supported initiatives to ensure access to public buildings and transportation for people with physical disabilities. In 1977, the ABA through its House of Delegates adopted a resolution supporting federal, state and local legislation designed to further equal employment opportunities for people with disabilities. Throughout the late 1970s and the 1980s, the ABA continued to sponsor initiatives to promote the rights of people with disabilities.

All these activities culminated in 1989, a year before the enactment of the ADA. In that year the ABA took an historic step, adopting a resolution recommending passage of federal legislation that prohibits disability discrimination "in a manner parallel to existing prohibitions on discrimination based on race, sex, national origin, and religion." The resolution explicitly called for federal legislation "to ensure equal opportunities for individuals with

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[2] An introductory statement to the *Reporter* explained its purpose:

> The Commission believes that clients of the mental disability system and other mentally disabled individuals will achieve full enjoyment of their legal rights only when members of the bar, responsible goverment officials, service providers, lay advocates, and consumers understand and are equipped to implement these rights. . . .

Summary and Analysis, 1 Mental Disability L. Rep. 5 (1976).

disabilities in employment, public accommodations and services (including mass transportation), telecommunications, *and activities of State and local governments.* . . ." (emphasis added).

The ABA supports the ADA as the embodiment of the principles set forth in its resolution. The ABA is convinced that the ADA is essential federal legislation that prohibits discrimination on the basis of disability and seeks to ensure equal opportunities, taking into consideration the economic benefits and costs, and providing clear standards for identifying such discrimination, without imposing undue hardship upon the states.

Based on decades of work on state and national legislation dealing with disabilities and the ABA's commitment to the principles of equal rights, the ABA has a special perspective to provide and a strong interest in the matter before the Court.

SUMMARY OF THE ARGUMENT

The ADA is a proper exercise of Congress' enforcement power under Section 5 of the Fourteenth Amendment to take remedial and prophylactic action to combat discrimination on the basis of disability. Unlike the age classification analyzed in *Kimel v. Florida Board of Regents*, __ U.S. __, 120 S. Ct. 631 (2000), the ADA is based on a record documenting that states have made many distinctions on the basis of disability that have been both invidious and irrational. While the states have played a complex role in providing care for individuals with disabilities, giving rise to the level of deference accorded by this Court in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), this history should not be mistaken for an absence of state discrimination. To the contrary, states' warehousing of people with disabilities in institutions, states' failure to ensure access to the ballot,

and state employers' discrimination against people with disabilities demonstrate the invidious nature of state conduct.

Moreover, although classifications on the basis of disability do not trigger strict judicial scrutiny, *see Cleburne*, 473 U.S. at 446, whether Congress acted within its enforcement power is not determined by the level of scrutiny to be applied. The enactment of the ADA was within Congress' power to enforce the constitutional prohibition against invidious and irrational discrimination on the basis of disability. Indeed, discrimination on this basis has operated on similar foundations as discrimination on the basis of race, ethnicity and gender—*i.e.*, stereotypes and notions of inferiority, stigma, and psychological discomfort with difference—and historically has taken analogous forms, such as segregation and other discriminatory state practices.

The ADA is not an attempt to redefine substantively the scope of the Fourteenth Amendment. It is, instead, a congruent and proportionate response that falls well within constitutional bounds.

ARGUMENT

I. THE RECORD BEFORE CONGRESS IN 1990 CONTAINED AMPLE EVIDENCE THAT STATES SEGREGATED AND DISCRIMINATED AGAINST PEOPLE WITH DISABILITIES AND DENIED THESE INDIVIDUALS FUNDAMENTAL RIGHTS.

The issue before the Court is whether Congress acted pursuant to a valid grant of constitutional authority when it enacted the ADA. *See Kimel*, 120 S. Ct. at 640; *Semi-*

nole Tribe v. Florida, 517 U.S. 44, 55 (1996).[3] The ABA submits that the ADA is within Congress' constitutional authority as an exercise of its powers under Section 5 of the Fourteenth Amendment, which necessarily limits the Eleventh Amendment and grants Congress the authority to abrogate states' sovereign immunity. *See Kimel*, 120 S. Ct. at 644; *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).[4]

Legislation is consistent with the Eleventh Amendment when there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). In applying the "congruence and proportionality" test, this Court concluded that neither the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (1994), nor the Age Discrimina-

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[3] A federal statute properly subjects states to suits by individuals if, as here, Congress unequivocally expressed its intent to abrogate the states' immunity, and Congress "effectuated that abrogation pursuant to a valid exercise of constitutional authority." *Kimel*, 120 S. Ct. at 640. The ADA clearly satisfies the first prong. *See* 42 U.S.C. § 12202 ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter."); 42 U.S.C. § 12101(b) ("It is the purpose of this Act . . . (4) to invoke the sweep of Congressional authority including the power to enforce the fourteenth amendment. . . ."). Thus, the analysis turns to whether Congress' action was within its authority under the Constitution.

[4] The Fourteenth Amendment provides, in relevant part:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . .
>
> Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

tion in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634 (1994), was appropriate legislation under Section 5 of the Fourteenth Amendment. *See City of Boerne*, 521 U.S. at 536; *Kimel*, 120 S. Ct. at 645. In each case, the Court found that the legislative record failed to reveal widespread patterns of unconstitutional conduct. *See City of Boerne*, 521 U.S. at 530; *Kimel*, 120 S. Ct. at 648-49. In contrast, the ADA is based on a significant history of state discrimination against people with disabilities. In passing the ADA, Congress acted on the basis of a compelling, lengthy and detailed factual predicate, determining that people with disabilities have been subjected to invidious prejudice and discrimination, and have had their rights abridged or denied. *See, e.g.*, H.R. Rep. No. 101-485, pt. 2, at 29-32 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 310-13; H.R. Rep. No. 101-485, pt. 1, at 24-25 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 268; H.R. Rep. No. 101-485, pt. 3, at 24-26 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 447-49; Sen. Rep. No. 101-116, at 5-15, 18-19 (1989).[5]

As this Court noted in *Olmstead v. L.C.*, 527 U.S. 581 (1999), the ADA incorporated Congressional findings that "individuals with disabilities continually encounter various forms of discrimination" and "historically, society has tended to isolate and segregate individuals with disabilities. . . ." *Id.* at 588-89 (citing 42 U.S.C. § 12101(a)(2), (5)). These findings are consistent with this Court's protection of the liberty interest of people with disabilities reflected in opinions preceding *Olmstead*. *See*,

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[5] Moreover, when determining whether Congress enacted a statute pursuant to its Section 5 power, "courts have always been free to consider evidence beyond that which is contained in the legislative record." *Kilcullen v. New York State Dep't of Labor*, 205 F.3d 77, 80 (2d Cir. 2000) (citing *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 200, 209, 211-12 (1997), and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 646 (1999)).

e.g., *O'Connor v. Donaldson*, 422 U.S. 563, 574-75 (1975) (observing that the state may not "fence in the harmless mentally ill solely to save its citizens from the exposure to those whose ways are different").

The record before Congress in 1990 was replete with examples of egregious conduct by the states—segregatory practices, laws that categorically denied people with disabilities fundamental rights, and other forms of invidious and irrational discrimination.

A. State Segregation and Mistreatment of People With Disabilities Within Institutions Have Been Particularly Egregious.

By the time of the ADA's enactment, it was well known that throughout this country's history many people with disabilities were continually subjected to segregation and institutionalization.[6] The findings of fact supporting the ADA point to segregation and institutionalization as a "serious and pervasive social problem." 42 U.S.C. § 12101(a)(2).

As Congress was aware, the deleterious consequences of state sponsored institutional segregation extended not only to the stigmatization of people with disabilities and limitations on access to community life, *see Olmstead*, 527 U.S. at 600 (segregation in institutions of people with disabilities "perpetuates unwarranted assumptions that people so isolated are incapable or unworthy of participating in community life"), but also to abuse and mistreatment found to be unconstitutional by several district

[6] The ADA was the latest in a series of steps Congress took to address overly restrictive placements of people with disabilities, including the enactment of the Developmentally Disabled Assistance and Bill of Rights, Pub. L. No. 88-164, 77 Stat. 282, (codified as amended 42 U.S.C. §§ 6000-6083 (1994)), and the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§701-796 (1994)). *See Olmstead*, 527 U.S. at 599-600.

courts.[7] *See, e.g., New York State Ass'n for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752, 765 (E.D.N.Y. 1973) ("*NYSARC*"). Congress also had before it this Court's decisions in *O'Connor*, 422 U.S. at 563, and *Youngberg v. Romero*, 457 U.S. 307 (1982), documenting the confinement of the harmless mentally ill and the states' failure to provide for basic health and safety needs of residents with mental retardation.

One example of the judicial record before Congress involved the Willowbrook State School for the Mentally Retarded ("Willowbrook"). *See NYSARC*, 357 F. Supp. at 752. Beginning eighteen years before the enactment of the ADA, District Judge Orrin G. Judd issued several decisions detailing some of the abuses to which Willowbrook patients had been subjected.[8] In an early decision,

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[7] Congress' attention to the problems of institutionalization stretches back at least to the enactment of the Rehabilitation Act. Senator Humphrey, the bill's sponsor, stated: "I am calling for public attention to three-fourths of the Nation's institutionalized mentally retarded who live in public and private residential facilities which are more than 50 years old, functionally inadequate and designed simply to isolate these persons from society. . . ." 118 Cong. Rec. 525 (1972).

[8] Willowbrook was one of the examples of the "problems with large-scale residential institutions for handicapped people" discussed in *Accommodating the Spectrum of Individual Abilities*, on which Congress relied in considering the ADA. U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 32 n.112 (1983) ("*Accommodating the Spectrum*"); H.R. Rep. No. 101-485, pt. 2, at 31 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 312. The report also cited *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1972), 344 F. Supp. 1341 (M.D. Ala. 1972), *aff'd in part, rev'd in part sub nom. Wyatt v. Aderholt*, 502 F.2d 1305 (5th Cir. 1974), and *Halderman v. Pennhurst State School and Hospital*, 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part, rev'd in part*, 612 F.2d 84 (3d Cir. 1979), *rev'd on other grounds*, 451 U.S. 1 (1981), as examples of the problems of institutionalization and the need for deinstitutionalization. *See Accommodating the Spectrum* nn.113, 119.

the court found that abuses at Willowbrook, a facility warehousing approximately 6200 children and adults in 1969, had continued unabated despite legislative findings dating from 1964 that indicated severe problems at the institution. *See id.* at 755, 756. Even that most basic of rights, the right to be free from physical harm, was denied the Willowbrook residents. *See id.* at 764-65.

Physical conditions at Willowbrook were horrific. The court found that residents were left unclothed or in filthy clothes; that all of the wards had non-functioning and overflowing toilets and sinks; and that sanitation was miserable. *See New York State Ass'n for Retarded Children, Inc. v. Carey*, No. 72 Civ. 356/357, 10-12, 15 (E.D.N.Y. Apr. 28, 1982) (Order to Appoint Special Master) ("*Willowbrook Order*").

Willowbrook residents were also deprived of other basic necessities. Many had "pipestem legs," a sign of inadequate nutrition, *id.* at 34, and lacked bedding, furniture, proper medical treatment, and programming that might have allowed them to maintain or learn skills. *See id.* at 13, 18. In 1982, more than ten years after the court's initial findings of fact and seven years after the entry of a consent decree, *see New York State Association for Retarded Children, Inc. v. Carey*, 393 F. Supp. 715 (E.D.N.Y. 1975), plaintiffs returned to court seeking the appointment of a special master to force compliance by state defendants. The court found that many of the problems identified earlier continued essentially unchanged. *See Willowbrook Order*, No. 72 Civ. 356/357, at 10, 15.

Indeed, Willowbrook was not an aberration; many other federal district courts were forced to intervene to protect the rights of segregated mentally ill and retarded residents of state institutions. *See, e.g., Halderman v. Pennhurst State School and Hosp.*, 446 F. Supp. 1295, 1303-09 (E.D. Pa. 1977), *aff'd in part, rev'd in part*, 612 F.2d 84 (3d Cir.

1979), *rev'd on other grounds*, 451 U.S. 1 (1981); *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1972), 344 F. Supp. 1341, 1343 (M.D. Ala. 1972), *aff'd in part, rev'd in part sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974). Federal decisions documented "dehumanizing" physical environments, "degrading and humiliating admission procedures, . . . critically substandard" ventilation problems, fire hazards and overcrowding, inferior food, and lack of adequate treatment and habilitation services. *Wyatt*, 334 F. Supp. at 1343. *See also Pennhurst*, 446 F. Supp. at 1303-08 (dehumanizing conditions).

The persistence of unconstitutional conditions at the various state institutions was due, at least in part, to the segregation inherent in institutionalization. It reflects antipathy and indifference to, as well as the political disempowerment of, individuals whose major life activities are limited by physical impairments. As the court wrote in *Pennhurst*, "few of the retarded are in a position to aid or protect their fellow residents or to complain about their own treatment. Pennhurst is isolated and segregated from the community." *Pennhurst*, 446 F. Supp. at 1320-21. The U.S. Commission on Civil Rights also noted that the use of institutions, which become isolated enclaves, generally situated in rural areas, resulted in segregation from family, friends and society. *See* U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 33 (1983) ("*Accommodating the Spectrum*").

The legislative findings supporting the enactment of the ADA show that Congress recognized that segregation and institutionalization continued to exist as forms of disability-based discrimination and that Congress intended to provide a remedy for this historic form of discrimination through the enactment of the ADA. As this Court recently acknowledged:

> [I]n findings applicable to the entire statute, Congress explicitly identified unjustified "segrega-

> tion" of persons with disabilities as a "for[m] of discrimination." *See* § 12101(a)(2) ("historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem"); § 12101(a)(5) ("individuals with disabilities continually encounter various forms of discrimination, including . . . segregation.").

Olmstead, 527 U.S. at 600. *See also* H.R. Rep. No. 101-485, pt. 2 at 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 310 (listing "segregation" as a form of "discrimination against people with disabilities"); H.R. Rep. No. 101-485, pt. 3, at 26 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 449 ("The ADA is a comprehensive piece of civil rights legislation which promises a new future: a future of inclusion and integration, and the end of exclusion and segregation.").

B. States Have Infringed the Voting Rights of People With Disabilities.

The record before Congress contained numerous examples of the ways in which states have denied people with disabilities access to polling places and limited their opportunities to participate in the political process. *See* Hearing before House Subcomm. on Select Educ., 101st Cong. 189 (Oct. 24, 1988); Hearing before House Subcomm. on Select Educ., 101st Cong. 41 (Oct. 6, 1989); 1 Law Reform in Disability Rights B2-10 (1981) (many states disenfranchise disabled voters based on classifications of mental disability in exercising their qualified right to determine conditions under which the right to vote may be utilized).

As this Court has recognized, the right to vote is a fundamental interest that may well represent the ultimate per-

sonal right "because [it is] preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966); *Dunn v. Blumstein*, 405 U.S. 330 (1972). While the states are vested with the power to determine the conditions under which the franchise may be exercised, *see Lassiter v. Northampton County Board of Education*, 360 U.S. 45 (1959), once the power to vote is granted to the electorate, the lines drawn on suffrage may not be inconsistent with the Equal Protection Clause of the Fourteenth Amendment. *See Harper*, 383 U.S. at 665.

Notwithstanding the critical importance of the franchise, the historical record is filled with examples of discriminatory state action impairing the voting rights of people with disabilities. These impairments include categorical disenfranchisement, lack of access to the ballot box, and the removal of the secret ballot.

More than two-thirds of the states continue to have categorical restrictions that disenfranchise people with cognitive impairments.[9] At least nine of these states use the vague terminology "idiots and insane persons" to disenfranchise potential voters. With these overly restrictive laws as a backdrop, state officials have refused to register disabled voters based on these laws. In *Carroll v. Cobb*, 139 N.J. Super. 439 (N.J. Super. Ct. App. Div. 1976), a New Jersey state appellate court overruled a board of election ban, stating "that a mentally retarded person need not be an 'idiot,' and a mentally ill person need not be 'insane.' " *Id.* at 450. *See also Manhattan*

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[9] *See* Appendix A. For example, the Alabama Constitution provides, "The following persons shall be disqualified both from registering, and from voting, namely: All idiots and insane persons." Ala. Const. art. VIII, § 182. Similarly, by statute Arizona bans "incapacitated" people from registering to vote and includes people with physical disabiltities among the groups that can be declared incapacitated. Ariz. Rev. Stat. § 16-101(A)(6) (1984).

State Citizen's Group, Inc. v. Bass, 524 F. Supp. 1270 (S.D.N.Y. 1981) (holding unconstitutional the disenfranchisement of people involuntarily committed to hospitals by court order but not declared incompetent). Yet because of the wide latitude frequently granted by the statutes, state agencies have often misused their power in disenfranchising people with disabilities. *See, e.g., I/M/O Absentee Ballots Cast by Five Residents of Trenton Psychiatric Hospital*, 331 N.J. Super. 31 (N.J. Super. Ct. App. Div. 2000).

Registration requirements have also served as a significant barrier to political participation. Before the passage of the ADA, most states did not allow accessible registration and instead required trips to the board of elections in order to register, thereby restricting access for people with mobility impairments. *See* Frances Fox Piven & Richard A. Cloward, *Why Americans Don't Vote* 178 (1988). Prior to 1917, no state provided for absentee balloting for the physically disabled, effectively disenfranchising the home or hospital bound. *See* George Fredrick Miller, *Absentee Voters and Suffrage Laws* 48 (1948). The use of absentee ballots remains limited in some states.[10]

As three recent actions in New York demonstrate, the problem of access continues today. *See People v. County of Delaware*, 82 F. Supp.2d 12 (N.D.N.Y. 2000) (failure of local officials to provide accessible polling places); *People v. County of Schoharie*, 82 F. Supp.2d 19 (N.D.N.Y. 2000) (same); *People v. County of Otsego*, 99 Civ. 2239 (N.D.N.Y. 1999) (same).

Moreover, in nearly every state, blind voters are unable to cast secret ballots. Despite the availability of alterna-

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[10] For example, West Virginia had allowed indirect voting by the physically disabled only if they were going to be out of the state. *See* Miller, *supra*, at 30.

tives such as tape recorders, specially designed ballots, or voting machines with Braille, which would allow the blind to cast secret votes, these disabled voters must have a relative present to hear the vote, or worse, have an election official transcribe the vote given. Testimony of this particular plight was plainly before Congress. *See* Hearing before House Subcomm. on Select Educ., 101st Cong. 48-49 (Oct. 24, 1988).[11]

C. State Employers Have Classified and Treated People with Disabilities According to Stereotyped Conceptions of Capabilities.

People with physical or mental disabilities have also been subjected to invidious discrimination with respect to opportunities for employment, categorically excluded from the work force and faced with numerous arbitrary obstacles to entrance and advancement. *See* Disability Rights Education and Defense Fund, Inc., *Law Reform in Disability Rights, Employment Rights: History, Trends and Status* E-4 (1981). Not only must they overcome basic barriers such as restricted access to offices and other buildings in which they would work, but also overt discrimination by employers who choose not to hire individuals with disabilities for a variety of reasons ranging from prejudice to misconceptions regarding the abilities

[11] A similar story can be told about the states' discrimination against people with disabilities in the selection of individuals for jury service, another important civic right. Historically, many states had policies that prevented people with disabilities from performing juror service. Specific exclusionary clauses disqualified, for example, those "afflicted with permanent disease or physical weakness," Ga. Code Ann. § 59-714-6 (1965), or those "afflicted with a bodily infirmity amounting to a disability." Okla. Stat. Ann., tit. 38, § 28 (West 1979). A large number of states still retain laws that require jurors to possess their "natural faculties." *See, e.g.*, Alaska Stat. § 9.20.010 (Michie 1973). In addition to these statutory prohibitions, courthouses and courtrooms are frequently inaccessible to the disabled. *See* Andrew Weis, *Peremptory Challenges: The Last Barrier to Jury Service for People with Disabilities*, 33 Willamette L. Rev. 1, 4 (1997).

of people with disabilities. *See* Don F. Nicolai & William J. Risel, *Access to Buildings and Equal Employment Opportunities for the Disabled: Survey of State Statutes*, 50 Temp. L.Q. 1067, 1085 (1977).

As Congress concluded in its findings in the ADA,

> [D]iscrimination against individuals with disabilities persists in employment. . . . [There is] outright intentional exclusion, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, and . . . relegation to lesser jobs and opportunities.

42 U.S.C. § 12101. Indeed, statistical studies before Congress demonstrated that unemployment rates among people with disabilities are drastically higher than rates of unemployment for non-disabled people, and only a small percentage of Americans with disabilities who could work if given the opportunity are actually employed. *See Accommodating the Spectrum* 29;[12] H.R. Rep. 101-485, pt. 2, at 32 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 314; S. Rep. No. 101-116, at 9 (1989).

Prior to the enactment of the ADA, certain people with disabilities were able to seek redress against state actors that received federal funding pursuant to the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (1994). *See, e.g., School Bd. v. Arline*, 480 U.S. 273 (1987). *See also Chalk v. United States*, 840 F.2d 701 (9th Cir. 1988) (injunction

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[12] Indeed, throughout the 1980s, despite the enactment of the Education of the Handicapped Act of 1970, Pub. L. No. 91-230, 84 Stat. 175 (codified as amended 20 U.S.C. §§ 1400-1485 (1994)), and the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§701-796 (1994)), the percentage of people with disabilities who were employed fell sharply. In addition, the disparity between the average income of employed people with disabilities and the average income of people with no disability increased greatly. *See* H.R. Rep. No. 101-485, pt. 2, at 32 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 314.

granted preventing school from transferring a teacher with AIDS to an administrative position). When considering the ADA, Congress was aware of *Arline* and the types of invidious employment discrimination that cases similar to *Arline* represented. *See* H.R. Rep. No. 101-485, pt. 2, at 30, 65, 71-72 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 312, 347, 353-54 (citing *Arline*); S. Rep. No. 101-116, at 7, 27, 34 (1989) (same). *See also Jackson v. State*, 544 A.2d 291 (Me. 1988) (state discriminated against person with diabetes by physical requirements in order to become a school bus driver).

In fact, through the ADA, Congress consciously addressed an incongruity left by the Rehabilitation Act—that a private right of action against the states for invidious discrimination was available only if the state received federal funds.[13] Congress found ample discrimination by the states and no evidence that the conduct was limited only to federally-funded state actors.[14]

II. WHETHER CONGRESS ACTED WITHIN ITS ENFORCEMENT POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT IS NOT DETERMINED BY THE LEVEL OF JUDICIAL SCRUTINY APPLIED TO CLASSIFICATIONS BASED ON DISABILITIES.

The fact that laws alleged to discriminate on the basis of disability are subject to rational basis review, rather than heightened scrutiny, should not be construed as lim-

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[13] The "resulting inconsistent treatment of people with disabilities by different State or local government agencies is both inequitable and illogical for a society committed to full access for people with disabilities." H.R. Rep. No. 101-485, pt. 2, at 37 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 319.

[14] Discrimination against people with disabilities in employment can be expected to be treated in other briefs to this Court, and therefore, the ABA seeks to avoid duplicating those arguments here.

iting the meaning of the mandate of the Equal Protection Clause. Indeed, the finding of discrimination in *Cleburne* supports the conclusion that Congress acted properly within its Section 5 powers in passing Titles I and II of the ADA.

A. The Rational Basis Test is a Doctrine of Judicial Restraint, Not an Assessment of the Scope of Congressional Authority.

The rational basis test was judicially created to give state legislatures wide latitude to address societal problems where courts have less competence, *see Cleburne*, 473 U.S. at 439-40, and is deferential in nature to prevent courts from over-reaching their judicial function. *See FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). Nonetheless, the test also serves to prohibit irrational classifications. Indeed, the decision to apply the rational basis test to classifications based on disability rested, in part, on this Court's stated concern, given the variation in the abilities and needs of people with disabilities, that "governmental bodies must have a certain amount of flexibility and freedom from judicial oversight in shaping and limiting their remedial efforts." *Cleburne*, 473 U.S. at 445.

This deference to legislative flexibility, though, does not take discrimination on the basis of disability out of the ambit of the Equal Protection Clause. To the contrary, this Court applies the rational basis standard to afford the latitude necessary for legislators to pursue policies to assist individuals with disabilities in fully engaging in activities and enjoying their right to equal protection under the law. *See Cleburne*, 473 U.S. at 446-47.[15] Absent some reason

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[15] The recognition that individuals with disabilities may require different treatment in order to guarantee equal protection is at the heart of the "reasonable accommodation" requirement of the ADA. *See* 42 U.S.C. § 12112(b)(5)(A).

to infer antipathy, it is presumed that "even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely [the Court] may think a political branch has acted." *Beach Communications*, 508 U.S. at 314 (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)). The rational basis standard is thus, "a paradigm of *judicial* restraint." *Id.* at 314 (emphasis added).

The rational basis test, however, is not toothless. Indeed, the zoning ordinance at issue in *Cleburne* provided an example of a governmental action that rested on "an irrational prejudice against the mentally retarded," and this Court unanimously found it invalid on that basis. *Cleburne*, 473 U.S. at 450. Thus, the more permissive standard of review does not preclude a finding that irrational or invidious differential treatment on the basis of disability constitutes a violation of the Constitution.

To rule otherwise would be to undermine the foundation of equal protection jurisprudence. The development of levels of scrutiny for different classifications was judicially created for the purpose of flushing out discriminatory behavior, not to confine the domain of the Equal Protection Clause. *See* John Hart Ely, *Democracy and Distrust* 146 (1980) (citing Larry G. Simon, *Racially Prejudicial Governmental Actions: A Motivation Theory of the Constitutional Bar Against Racial Discrimination*, 15 San Diego L. Rev. 1041 (1978)). The Fourteenth Amendment prohibits invidious and irrational discrimination by the states even if it is not based on a suspect classification. This Court expressly stated in *Romer v. Evans*, 517 U.S. 620 (1996), that "[b]y requiring that the classification bear a rational relationship to an independent and legitimate legislative end, [the Court] ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Id.* at 633.

Indeed, the categories of scrutiny this Court utilizes are not static, and absurd results would follow were the standard of judicial scrutiny the measure for determining the breadth of legislative authority. Nor could it be said that the level of review afforded a particular classification was a reliable indicator of whether unconstitutional discrimination against that group was prevalent. In fact, during certain periods in our nation's history, discrimination on the basis of race and gender was not subjected to a heightened level of scrutiny. *See, e.g., Yick Wo*, 118 U.S. at 356 (race); *Reed v. Reed*, 404 U.S. 71 (1971) (gender). The level of scrutiny applied was simply not tied to whether unconstitutional discrimination existed. In *Reed*, for example, this Court applied the rational basis test, but shortly thereafter classifications based upon gender were elevated to a heightened standard of review. *See Reed*, 404 U.S. at 71; *Craig v. Boren*, 429 U.S. 190, 197 (1976). Had Congress acted to prevent or remedy discrimination on the basis of sex in 1971, surely the abrogation of sovereign immunity would not have been invalid simply because the law was enacted during the time courts applied the rational basis test.

B. Congress' Authority to Remediate Unconstitutional Discrimination Against People with Disabilities Includes the Power to Proscribe Some Conduct That May Be Constitutional.

The scope of Congressional authority to enforce the provisions of the Fourteenth Amendment and, in particular, the Due Process and Equal Protection Clauses, is not controlled by the level of scrutiny applied by courts and not limited to classifications or government actions that trigger strict scrutiny. It is, instead, based on a constitutional role to protect individuals against invidious discrimination regardless of a person's disfavored status. This conclusion is consistent with the principle that

Congress has broad power to enact legislation to enforce the guarantees of the Fourteenth Amendment even when, in the process, the legislation prohibits conduct that is not in itself unconstitutional. *See Kimel*, 120 S. Ct. at 644 (citing *City of Boerne*, 521 U.S. at 518). For example, this Court held in *City of Rome v. United States*, 446 U.S. 156 (1980), that Congress could prohibit changes in electoral schemes with discriminatory effects even as it held, the same day in *Mobile v. Bolden*, 446 U.S. 55 (1980), that such schemes do not, of themselves, violate the Fifteenth Amendment. *See also Gregory v. Ashcroft*, 501 U.S. 452 (1991) ("[I]t is one thing to limit judicially created scrutiny, and it is quite another to fashion a restraint on Congress' legislative authority . . . the latter is both counter-majoritarian and an intrusion on a co-equal branch of the Federal Government." (White, J., concurring and dissenting)). Recently, in *Lopez v. Monterey County*, 525 U.S. 266 (1999), this Court upheld the Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1994), recognizing Congress' authority to require federal pre-clearance of changes in state and local voting laws even when the laws themselves have not been found to be unconstitutional. *See also South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (allowing Congress to enforce the Fifteenth Amendment by suspending literacy tests despite the facial constitutionality of tests under *Lassiter*).

C. *Cleburne* Demonstrates the Existence of Unconstitutional Behavior.

This Court held in *Cleburne* that the City of Cleburne had violated the Equal Protection Clause by requiring a group home for people with mental retardation to obtain a special use permit, when it did not require such a permit for apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, or dormitories. *See Cleburne*, 473 U.S. at 447. The Court held that

despite the fact that states shall have the "latitude necessary" to legislate with respect to people with disabilities, such legislation may only affect the rights of the disabled in an "incidental manner." *Id.* To pass constitutional muster, states must be able to demonstrate a real relationship between the classification utilized and the asserted goal to be fostered by the legislation, and not simply rely upon an attenuated relationship, or the bare desire to harm a politically unpopular group. *See Zobel v. Williams*, 457 U.S. 55, 63 (1982); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 535 (1973). Consequently, the Court found that the group home posed no special threat to any legitimate state interest, and presented no more of a threat than a host of other uses. Requiring the special use permit, therefore, violated the Constitution. While states have the latitude to assist people with disabilities to reach their full potential, when they actively engage in activities that burden individuals with disabilities, they may do so only in an "incidental manner." *Cleburne*, 473 U.S. at 446.

III. STATE CLASSIFICATIONS BASED ON DISABILITY, LIKE THOSE BASED ON RACE, ETHNICITY AND GENDER, HAVE REFLECTED STEREOTYPES, STIGMA, AND PREJUDICE AND ARE RIGHTLY WITHIN THE PURVIEW OF THE FOURTEENTH AMENDMENT.

A. Many of the Same Psychological and Sociological Factors That Underlie Discrimination Against People With Disabilities Also Underlie Discrimination Based on Race and Gender.

In its equal protection jurisprudence, this Court has recognized that certain state actions classifying individuals are the product of illegitimate motivations. This Court has rejected state classifications and state actions based on

stereotyping, *see, e.g., United States v. Virginia*, 518 U.S. 515 (1996); stigmatization, *see, e.g., Brown v. Board of Education*, 347 U.S. 483 (1954); and psychological discomfort with a minority's differences, *see, e.g.,Watson v. Memphis*, 373 U.S. 526 (1963); *Palmore v. Sidoti*, 466 U.S. 429 (1984). Significantly, the history of state treatment of people with disabilities has been marked by actions based on these same underlying motivations. *See* Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 399-407 (1991).

Classifications based on gender stereotypes, that is, on assumptions about what characteristics and capabilities attach to being male or female, have been held illegitimate both because they are often inaccurate as to individuals disadvantaged by the classification and because they run the risk of perpetuating the very assumptions they reflect. *See, e.g., United States v. Virginia*, 518 U.S. at 533; *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127, 139 n.11 (1994); *Orr v. Orr*, 440 U.S. 268, 283 (1979). While this Court's opinion in *Cleburne* makes clear that classifications based on mental retardation that rely on judgments regarding the characteristics of people with mental retardation may in some instances be sanctioned, this Court nonetheless refused to accept a justification for a governmental action that was based purely on stereotype. *Cleburne*, 473 U.S. at 432 ("[I]t is difficult to believe that the groups of mildly or moderately mentally retarded individuals who would live at 201 Featherston would present any different or special hazard.").

People with disabilities have often been disadvantaged by the prevalence of stereotypes about their abilities and behavior. Like members of racial and ethnic groups, and women, they have been barred from public educational and employment opportunities as a result of generally erroneous assumptions about their skills and behavior.

See, e.g., Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972); *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972). *See also* Nicolai & Risel, *supra*, at 1085 (employment). Finally, just as women were once barred from voting and from serving on juries, so too have many individuals with disabilities been denied access to these civic rights and responsibilities, notwithstanding that they were quite capable of exercising them.

As this Court pointed out in *Brown*, stigmatization, the marking of one group as less worthy than another, occurs when one group is set aside from society. *Brown*, 347 U.S. at 494 ("to separate [children] . . . solely because of their race generates a feeling of inferiority as to their status in the community"). For racial groups and women, the judgment that certain groups are less worthy or have inferior capacities has often taken the form of laws excluding the disfavored group from public institutions, accommodations and opportunities, as in cases restricting the entry of blacks or women into state educational programs, jury duty, and access to certain professions. *See, e.g., United States v. Virginia*, 518 U.S. at 515 (gender); *J.E.B.*, 511 U.S. at 131 n.2 (exclusion of women from jury duty); *Reed*, 404 U.S. at 71 (men preferred as administrators); *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880) (denial of right to serve on a jury "is practically a brand . . . affixed by law, an assertion of their inferiority"); *Bradwell v. Illinois*, 16 Wall 130 (1873) (bar against women in the legal profession); *Geier v. University of Tennessee*, 597 F.2d 1056 (6th Cir. 1979) (race). Similarly, people with disabilities have also been excluded from many of these same public services, institutions and opportunities, and have been stigmatized as a result. *See supra*, in Point I.B., C.

This Court has recognized with regard to racial discrimination that psychological discomfort with or a desire

to separate from those who are different is an unacceptable motivation for state action. *See, e.g., Palmore*, 466 U.S. at 433-34; *Watson*, 373 U.S. at 526; *Buchanan v. Warley*, 245 U.S. 60 (1917). The desire to separate from those who are different has also been a factor in the development of state policies concerning people with disabilities: for example, "a desire to segregate handicapped people from the rest of society prompted the development of residential institutions." *Accommodating the Spectrum* 34. In *Cleburne*, this Court concluded, "mere negative attitudes or fear . . . are not permissible bases for treating a home for the mentally retarded differently." *Cleburne*, 473 U.S. at 448. As the Court stated in *O'Connor*, the state "cannot fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different." *O'Connor*, 422 U.S. at 574-75.[16]

B. The History of Discrimination Against People with Disabilities Demonstrates that They Have Been Segregated, Discriminated Against, and Stripped of Fundamental Rights by States in a Manner Similar to the History of Discrimination Based on Race and Gender.

In contrast to the legislative record examined in *Kimel*, the ample record before Congress when it enacted the ADA included discrimination rising to the level of constitutional violations. In its deliberations on the ADA,

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[16] In the early twentieth century in the United States, even forced sterilization of the mentally and physically disabled was not uncommon. *See* Robert L. Burgdorf, Jr. & Marcia Pearce Burgdorf, *The Wicked Witch is Almost Dead:* Buck v. Bell *and the Sterilization of Handicapped Persons*, 50 Temp. L.Q. 995 (1977). In 1930, 28 states had legislation permitting forced sterilization, *see id.*, and it is estimated that, by 1963, almost 64,000 persons had been involuntarily sterilized under state eugenic sterilization laws. *See* Elizabeth S. Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 Duke L.J. 806, 865 n.2 (1986).

Congress found that people with disabilities have been "subjected to a history of purposeful unequal treatment," in such critical areas as "housing, employment, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. § 12101. Congress further found that individuals with disabilities have been "relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals. . . ." *Id.*[17] Although not identical to the history of discrimination on the basis of race, ethnicity, and gender, the history of discrimination against people with disabilities shows that states have also subjected them to forms of segregation and discrimination, and deprived them of basic rights.

This Court has long seen segregation, as well as the stigmatization that derives from it, as one of the great evils of both race and gender based discrimination. *See Brown*, 347 U.S. at 483, *United States v. Virginia*, 518 U.S. at 515; *Watson*, 373 U.S. at 526. It rejected residential discrimination as long ago as 1917, when it invalidated a Kentucky law forbidding blacks to buy homes in white neighborhoods. *See Buchanan*, 245 U.S. at 60; *Jones v. Mayer*, 392 U.S. 409 (1968) (private refusal to sell); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (enforcement of restrictive covenants). And, in 1954, this Court ruled, resoundingly, that "in the field of public education the doctrine of 'separate but equal' has no place." *Brown*, 347 U.S. at 493. It has also rejected state sponsored segregation on the basis

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[17] *Amicus* is not arguing here that classifications based on disability should be accorded heightened scrutiny, an issue decided in *Cleburne*, 473 U.S. at 432. The ABA submits, however, that the history of state conduct, including warehousing individuals in state-run institutions—and the horrendous conditions that were allowed to exist for years—demonstrates that states have discriminated against people with disabilities and reflects some of the barriers faced by people with disabilities to seeking redress.

of both race and sex in higher education, *see, e.g., Sweatt v. Painter*, 339 U.S. 629 (1950) (race); *United States v. Virginia*, 518 U.S. at 515 (gender), and has refused to permit race and gender based exclusion from such public institutions as jury duty and voting. *See, e.g., J.E.B.*, 511 U.S. at 127 (gender); *Frontiero v. Richardson*, 411 U.S. 677, 684-685 (1973) (discussion of exclusion from voting); *Strauder*, 100 U.S. at 303 (race). Common to all these cases is a recognition of the harm done to a group excluded from the fundamental aspects of civic life.

As discussed *supra*, in Point I.A., people with disabilities similarly have been subjected to state sanctioned segregation and exclusion. *See, e.g., Timothy W. v. Rochester, New Hampshire School Dist.*, 675 F.2d 954 (1st Cir. 1989) (exclusion from public school); *Campbell v. Talladega County Bd. of Educ.*, 518 F. Supp. 47 (N.D. Ala. 1981) (same); *Mills*, 348 F. Supp. at 866 (exclusion from public school); *Pennsylvania Ass'n for Retarded Children*, 343 F. Supp. at 297 (relegation to separate and unequal education facilities).[18]

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[18] This Court has consistently acknowledged the historical segregation of individuals with disabilities in education by noting the significant evidence before Congress that prompted the passage of the Education of the Handicapped Act of 1970, Pub. L. No. 91-230, 84 Stat. 175 (codified as amended at 20 U.S.C. §§ 1400-1485 (1994)). *See Honig v. Doe*, 484 U.S. 305, 309 (1988); *Board of Educ. v. Rowley*, 458 U.S. 176, 178-79 (1982). In *Honig*, this Court indicated that when the Act was passed, "one out of every eight [disabled] children was excluded from the public school system altogether," citing 20 U.S.C. § 1400(b)(4), and "many others were simply 'warehoused' in special classes or were neglectfully shepherded through the system until they were old enough to drop out." *Honig*, 484 U.S. at 309 (citing H.R. Rep. No. 94-332, pt. 2 (1975)).

IV. THE STATUTORY LANGUAGE AND MANDATES OF THE ADA ARE WELL WITHIN CONSTITUTIONAL BOUNDS.

Section 5 of the Fourteenth Amendment is an affirmative grant of power to Congress. "It is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." *Kimel*, 120 S. Ct. at 644 (quoting *City of Boerne*, 521 U.S. at 520; *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)). In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), this Court defined valid efforts to exercise Congress' powers under Section 5 of the Fourteenth Amendment: "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Florida Prepaid*, 527 U.S. at 638 (quoting *City of Boerne*, 521 U.S. at 519-20). As the Court reiterated in *Kimel*, Congress' power to enforce the guarantees of the Fourteenth Amendment is not confined to the precise prohibitions contained therein. *Kimel*, 120 S. Ct. at 644 (citing *City of Boerne*, 521 U.S. at 518); *supra* in Point II.B.

As both the United States Senate and House of Representatives recognized toward the end of the 1980s, then current laws were "inadequate" to combat "the pervasive problems of discrimination that people with disabilities [were] facing." S. Rep. No. 101-116, at 18 (1989); H.R. Rep. No. 101-485, pt. 2, at 47 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 329. The Senate recognized the need for "omnibus civil rights legislation" for the disabled. S. Rep. No. 101-116, at 19 (1989). Similarly, the House addressed the need for legislation that "will finally set in place the necessary civil rights protections for people with disabilities." H.R. Rep. No. 101-485, pt. 2, at 40 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 322.

The remedy Congress crafted in the ADA, which considers the economic benefits and costs of the conduct at issue and which provides clear standards for identifying discrimination, is proportional with and congruent to the invidious and irrational state conduct documented over time and discussed in this brief. The congruence of the remedy is exemplified by the fact that the statute requires only *reasonable* accommodation. *See* 42 U.S.C. § 12111(9) (reasonable accommodation). Although comprehensive in coverage, the ADA also contains a number of other significant limits. *See, e.g.*, 42 U.S.C. §§ 12102(2) (definition of disability), 12111(10) (undue hardship), 12113 (general defenses and qualification standards). Under the ADA's employment provisions, employers are not required to hire individuals who are not qualified for a particular job or to give preference to applicants with disabilities over equally qualified or more qualified nondisabled applicants. *See* EEOC Interpretive Guidance, Background, 29 C.F.R. § 1630 (1998). There are also outright defenses to a charge of discrimination, including job-related exclusion and business necessity, *see* 42 U.S.C. § 12113(a), imposition of a threat to the health and safety of others in the work place, *see id.* § 12113(b), and dangers posed by certain communicable diseases among food service workers. *See id.* § 12113(d).[19] Also, an employer is not required to make an accommodation that would impose an "undue hardship" on the operation of business. 42 U.S.C. § 12112(b)(5)(A). The statute pro-

[19] Indeed, the ABA's 1989 resolution called for federal legislation that takes into consideration the economic benefits and costs, and provides clear standards for identifying such discrimination, and the ADA more than meets these criteria. The ADA was a measured response, balancing the goal of integration of individuals with disabilities into society with competing state interests such as efficiency in the work force. *See* Roger C. Hartley, *The New Federalism & the ADA: State Sovereign Immunity from Private Suits after* Boerne, 24 N.Y.U. Rev. L. & Soc. Change 481 (1998).

vides that "undue hardship" means "an action requiring significant difficulty or expense" in light of such considerations as the nature of the accommodation; the overall financial resources of the employer; the total number of employees at the facility; and the effect of the accommodation on the operation of the facility; as well as the type of operation involved, its fiscal makeup, and geographic location. *See* 42 U.S.C. § 12111(10)(A)-(B).

Pursuant to the ADA, states may not discriminate in their employment practices against people with disabilities, except in an incidental manner in order to achieve legitimate aims. *See id.* §§ 12111(5)(A), 12112. Where the burden is more than incidental, the ADA provides that the employee is entitled to an accommodation that must be reasonable. *See id.* § 12112(b)(5)(A). If no reasonable accommodation can be made that will permit the individual to do the job at issue, and the individual cannot do the job without accommodations, the employer may treat the disabled employee differently, and even may deny him employment. *See id.* § 12113.

Indeed, the ABA Commission's studies have found that it is very difficult for plaintiffs to prevail under the ADA. *See 1999 Employment Decisions Under the ADA Title I Survey Update*, 24 Mental & Physical Disability L. Rep. 348 (2000). The ADA's approach is, thus, quite different from that of the ADEA, at issue in *Kimel*. The ADEA prohibited all employment discrimination on the basis of age against people over the age of 40 years old. *See* 29 U.S.C. § 623(a)(1). The only relief from this broad prohibition appeared in the rules enacted under the ADEA. By their own terms, these rules are to be interpreted narrowly and require that employers demonstrate a substantial basis for the belief that all or nearly all employees above a given age are unqualified for a certain position or that individual testing is totally impractical. *See Kimel*, 120 S. Ct. at 647-48.

In contrast, the ADA's incorporation of a "reasonableness" standard to its duty to accommodate and its use of explicit economic considerations favorable to the employer demonstrate that the statute is congruent and proportional to the harm addressed. In drafting the ADA, Congress properly balanced the states' interests with the goal of protecting people with disabilities from unconstitutional state action. It did so by clearly limiting the economic burdens posed by the statute's requirements. The ADA is a measured response by Congress entitled to deference; it is well within the parameters of congruence and proportionality and is, therefore, constitutional.

CONCLUSION

The judgment of the Court of Appeals for the Eleventh Circuit should be affirmed.

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APPENDIX

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Ala. Const. art. VIII, § 182; Alaska Const. art. V, § 2; Ark. Const. art. III, § 5; Cal. Const. art. II, § 4; Del. Const. art. V, § 2; Fla. Const. art. VI, § 4(a); Ga. Const. art. II, § 1(3)(b); Haw. Const. art. II, § 2; Iowa Const. art. II, § 5; Ky. Const. § 145(3); La. Const. art. I, § 10(A); Me. Const. art. II, § 1; Md. Const. art. I, § 4; Mich. Const. art. II, § 2; Minn. Const. art. VII, § 1; Mo. Const. art. VI, § 2; Mont. Const. art. IV, § 2; Neb. Const. art. VI, § 2; N.J. Const. art. VI, § 1(6); N.M. Const. art VII, § 1; Ohio Const. art V, § 6; R.I. Const. art. II, § 1; S.C. Const. art. II, § 7; S.D. Const. art. VII, § 2; Tex. Const. art. VI, § 1; Utah Const. art. IV, § 6; Va. Const. art. II, § 1; Wash. Const. art. VI, § 3; W. Va. Const. art. IV, § 1; Wyo. Const. art. 6, § 6; Ariz. Rev. Stat. § 16-101(A)(6) (1984); Mass. Gen. Laws Ch. 51, § 1 (1999); Miss. Code Ann. § 241(1) (1991); Wis. Stat. § 6.03(3) (1999).

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No. 99-1240

IN THE

Supreme Court of the United States

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA AND THE ALABAMA DEPARTMENT OF YOUTH SERVICES,

Petitioners,

v.

PATRICIA GARRETT AND MILTON ASH,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN CANCER SOCIETY IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Do Title I and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.*, properly invoke Congress' enforcement authority under Section 5 of the Fourteenth Amendment?

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INTEREST OF *AMICUS CURIAE*

The American Cancer Society ("ACS") is a nationwide community-based voluntary health organization dedicated to eliminating cancer as a major health problem by preventing cancer, saving lives and diminishing suffering from cancer through research, education, advocacy and service.[1] ACS consists of more than two million volunteers nationwide who are working to conquer cancer and to promote beneficial policies, laws and regulations for those affected by cancer. ACS believes that the Americans with Disabilities Act of 1990 ("ADA") is a vital law because it shields persons with a history of cancer from unconstitutional discrimination.

ACS is submitting this *amicus* brief to place before the Court the views of members of the public and health professionals committed to improving the quality of life of cancer patients. The evidence shows that discrimination against persons with cancer, particularly by employers, has been a persistent problem in the United States. In many instances, an employee's only access to health care is through an employer-based insurance program. Thus, an employer that discriminates on the basis of a cancer diagnosis may not only destroy the patient's financial well being, but may also deprive the patient of life-saving therapies.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* affirms that no counsel for either party authored any part of this brief and that no one other than *amicus curiae* provided any financial support for the preparation of this brief.

Pursuant to Supreme Court Rule 37.2, written consent to the filing of this brief has been obtained from counsel for Petitioners and Respondents, and from the Solicitor General of the United States, and the documents reflecting consent have been filed with the Clerk's office.

ACS believes that no employer should have the right to discriminate against cancer survivors. As the most recognized representative of cancer survivors, ACS is well suited to address issues relating to discrimination against those with a history of cancer.

SUMMARY OF ARGUMENT

In enacting the ADA, Congress properly invoked its authority under Section 5 of the Fourteenth Amendment to remedy unconstitutional discrimination against cancer patients and other disabled persons. The express language of the ADA indicates that Congress intended to remedy a pattern and practice of constitutional violations. The ADA also explicitly abrogated states' immunity from suits by private individuals.

The legislative history of the ADA demonstrates that Congress specifically considered constitutional violations against disabled persons. Congress also expressly considered evidence of pervasive and irrational discrimination against persons with cancer histories, and concluded that remedial legislation was warranted. And Congress considered evidence of state-sponsored discrimination against persons with cancer.

Furthermore, in evaluating Congress' exercise of legislative power, it is also appropriate to consider evidence outside the legislative record. The two Congresses immediately preceding the one that enacted the ADA considered evidence of pervasive state discrimination against persons with cancer, and irrational employment discrimination against persons with cancer histories, based on myths, unfounded fears, and ignorance of how cancer affects the body. Moreover, at the time Congress passed the ADA, publicly available studies demonstrated pervasive discrimination against cancer patients. Finally, Congress was likely aware that courts were considering discrimination against cancer patients. Here,

such evidence indicates that Congress appropriately enacted the ADA, among other things, to remedy and prevent widespread discrimination against persons with cancer.

ARGUMENT

One of the reasons that Congress enacted the ADA was to remedy unconstitutional discrimination by the states against people with cancer. This Congressional purpose is evident in the language of the statute and its legislative history. In addition, at the time Congress enacted the ADA, widespread evidence outside of the legislative record proved that cancer-based discrimination by the states was a persistent evil in the United States that required national legislation as a remedy. Congress properly addressed this discrimination by explicitly abrogating states' immunity from suit by private individuals and then imposing appropriate remedies. In so doing, Congress properly exercised its enforcement power under Section 5 of the Fourteenth Amendment.

ACS is concerned that if the Court reverses the judgment below, persons with cancer may once again be subject to unconstitutional discrimination. For the reasons set forth below, ACS respectfully requests that the Court affirm the judgment of the Eleventh Circuit.

I. THE STATUTORY LANGUAGE DEMONSTRATES THAT CONGRESS PROPERLY INVOKED ITS SECTION 5 ENFORCEMENT POWER

A. The Statutory Language Proves That Congress Intended To Remedy A Pattern And Practice Of Constitutional Violations

Section 5 of the Fourteenth Amendment grants Congress the power to enforce the Fourteenth Amendment to remedy or prevent constitutional violations. *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997); *Florida Prepaid Postsecondary*

Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627, 639-41 (1999); *Kimel v. Florida Board of Regents*, 120 S. Ct. 631, 634 (2000). To determine whether Congress has validly exercised its enforcement power, this Court typically looks at two factors: first, whether the legislation is intended to remedy or prevent a "pattern and practice" of constitutional violations, and second, whether the legislation is "congruent and proportional" to the injury to be prevented or remedied. *City of Boerne*, 521 U.S. at 534; *Florida Prepaid*, 527 U.S. at 639; *Kimel*, 120 S. Ct. at 645. ACS will address only the "pattern and practice" factor and leave to the Respondents and other *amici curiae* the discussion regarding the congruence and proportionality of this legislation.

This Court looks initially to the express language of any statute to discern Congressional intent behind its enactment.[2] Moreover, the Court has stated that "in all cases of statutory construction, our task is to interpret the words of these statutes in light of the purposes Congress sought to serve." *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979). In particular, the Court examines the text of a statute when evaluating Congress' invocation of enforcement powers under Section 5 of the Fourteenth Amendment to determine Congressional intent behind the enactment. For example, in *United States v. Guest*, 383 U.S. 745, 754-55 (1966), the Court studied the "clear language" of a federal civil rights statute and decided that "the statue d[id]

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[2] *See, e.g., Ardestani v. Immigration and Naturalization Service*, 502 U.S. 129, 135 (1991) ("[t]he starting point in statutory interpretation is 'the language [of the statute] itself.'") (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)). *See also Lewis v. United States*, 445 U.S. 55, 60 (1980) (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979)); *Owen v. City of Independence*, 445 U.S. 622, 635 (1980) (citing *Andrus v. Allard*, 444 U.S. 51, 56 (1979)).

not purport to give substantive, as opposed to remedial implementation to any rights secured by [the Equal Protection] Clause," and thus was a proper exercise of Congress' Section 5 powers.[3]

The express language of the ADA shows that Congress intended to remedy past and existing unconstitutional discrimination against disabled persons. Specifically, Title I states that its purpose is "to invoke the sweep of congressional authority, including the power to enforce the Fourteenth Amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4) (1994). Accordingly, the Act's stated purpose is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." § 12101(b)(1). The ADA also expressly reflects Congress' knowledge that "historically, society has tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2).

B. The Statutory Language Also Demonstrates That The ADA Remedies Irrational State Action

The statutory language confirms that the ADA was intended to remedy discrimination that rises to the level of constitutional violations. First, the ADA's express language shows that it was intended to remedy state action:

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[3] *See also United States v. Morrison*, 120 S. Ct. 1740, 1747-48 (2000) (examining the language of the Violence Against Women Act of 1994 to determine the scope of the statute); *Florida Prepaid*, 527 U.S. at 644 (noting that the language of the statute did not reveal an alleged Congressional intent).

"[D]iscrimination against individuals with disabilities persists in such critical areas as . . . education, . . . voting and access to public services." 42 U.S.C. § 12101(a)(3). The statute carefully defines "Public Entity" as "any state or local government . . . or other instrumentality of a *state*," and specifies that "[n]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a *public entity*, or be subjected to discrimination by any such entity." 42 U.S.C. §§ 12131(1)(a), (b); 12132 (1994) (emphasis added).

Also evident in the text of the ADA is Congress' intent to prohibit discrimination by state employers. Title I states that an "employer, employment agency, labor organization, or joint-management committee" may not discriminate against any qualified individual with a disability in regard to any term, condition or privilege of employment. *See* 42 U.S.C. §§ 12111-12 (1994). The definition of employer in the Act specifically excludes certain bodies, but states are not one of the enumerated exclusions. *Id.* § 12111(5)(B). State employers, then, are subject to the ADA. The Court need look no further than the language of the ADA itself for concrete proof that Congress intended to remedy state action.

Second, the language of the ADA confirms that the statute is intended to remedy irrational actions against individuals by the states. If Petitioners are correct that disability discrimination is subject to rational basis review, *see City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985), this statutory language corroborates that Congress intended to remedy discrimination that was unconstitutional. The statute is rife with references to pervasive, irrational discrimination of various types, including "outright intentional exclusion, . . . exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs,

activities, benefits, jobs." 42 U.S.C. § 12101(a)(5). Furthermore, Congress noted in the statute that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous . . ." 42 U.S.C. § 12101. Based on the language of the ADA alone, Congress' intent to remedy irrational discrimination is embedded in the statute.

C. Congress Explicitly Abrogated States' Immunity From Suit By Private Individuals

This Court should conclude that Congress properly invoked its Fourteenth Amendment authority to impose remedies against the states by abrogating their Eleventh Amendment immunity. It is well settled that Congress' Section 5 authority is one of the powers that may be used to abrogate the immunity.[4] Furthermore, there can be no dispute that Congress intended to abrogate the immunity, because the statute includes the following provision:

> A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same

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[4] *Kimel*, 120 S. Ct. at 644; *cf. Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73 (1996) (the Commerce Clause may not be used to circumvent the Eleventh Amendment's jurisdictional limitations).

> extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

42 U.S.C. § 12202 (1994). Accordingly, the statutory language demonstrates that Congress properly exercised its authority to impose ADA remedies against the states.

II. THE LEGISLATIVE HISTORY OF THE ADA DEMONSTRATES THAT CONGRESS INTENDED TO PREVENT AND REMEDY UNCONSTITUTIONAL DISCRIMINATION AGAINST PEOPLE WITH CANCER AND OTHER DISABLED PERSONS

The legislative history of the ADA confirms that Congress intended, among other things, to remedy a long pattern and practice of pervasive and unconstitutional discrimination against disabled persons. In *Kimel*, the Court searched the legislative history of the Age Discrimination in Employment Act for evidence that Congress considered unconstitutional discrimination and found only "isolated sentences clipped from floor debates and legislative reports." 120 S. Ct. at 649. In stark contrast, the legislative history of the ADA reveals a plethora of studies dealing with state discrimination and lengthy testimony from experts on discrimination against the disabled, as well as direct testimony from disabled persons. Unlike in *Kimel*, the evidence in the ADA's legislative history demonstrates a proper exercise of Section 5 authority.

A. Congress Specifically Addressed Constitutional Harms To Disabled Persons In Passing The ADA

Evidence that Congress considered constitutional violations against disabled persons when enacting the ADA permeates its legislative history. For example, Congress viewed discrimination "from a civil rights perspective" and identi-

fied Americans with disabilities "as a minority group . . . worthy of basic civil rights protections." H.R. Rep. 101-485, pt. 3, at 26 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 448. Congress also described the ADA as "a comprehensive piece of civil rights legislation which promises a new future: a future of inclusion and integration, and the end of exclusion and segregation." *Id.* Congress likewise recognized that unequal treatment of disabled persons relegated them "to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the ability of such individuals to participate in and contribute to society." S. Rep. No. 101-116, at 15 (1989). Accordingly, Congress vowed that "[t]his Act will finally set in place the necessary civil rights protections for people with disabilities." *Id.* at 40.

B. Congress Considered Evidence Of Pervasive And Irrational Employment Discrimination Against Persons With Cancer

When passing the ADA, Congress ensured that the "physical impairments" covered by the Act included cancer. The legislative history states that "there still exists . . . widespread irrational prejudice against persons with cancer" and that "being identified as disabled often carries both blatant and subtle stigma." H.R. Rep. No. 101-485, pt. 2, at 75 (1990), 1990 U.S.C.C.A.N. at 358; *see also* H.R. Rep. No. 101-485, pt. 3, at 44, 1990 U.S.C.C.A.N. at 467. As just one example, Congress cited instances of employers that discriminated against cancer patients by requiring medical examinations prior to offering employment and using this information "to exclude applicants with disabilities—particularly those with so-called hidden disabilities such as cancer—before their ability to perform the job was

even evaluated." H.R. Rep. No. 101-485, pt. 2, at 72, 1990 U.S.C.C.A.N. at 355.

A review of the legislative history reveals that Congress evaluated abundant evidence of a pattern and practice of employment discrimination against persons with cancer. Among other things, Congress heard testimony from several experts in the field of cancer research, including reports presented by the National Coalition for Cancer Survivorship, the Disability Rights Education and Defense Fund, and the Metropolitan Life Insurance Company, which had performed a study evaluating the work performance of cancer patients.[5]

The National Coalition for Cancer Survivorship study that Congress considered found that "between 20% and 84% of cancer patients reported employment discrimination attributed to their cancer histories."[6] The report further found that cancer survivors were denied job opportunities because of the myth that cancer is a death sentence, that it is contagious, and that it diminishes worker productivity. *Id.*

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[5] *See Americans with Disabilities Act of 1989: Hearings before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong. 383 (1989) (prepared statement of the National Coalition for Cancer Survivorship); *Hearing on H.R. 2273, The Americans With Disabilities Act of 1989: Joint Hearing Before the House of Representatives Subcomm. on Education and Labor*, 101st Cong. 88 (1989) (statement of Arlene B. Mayerson, Disability Rights Education and Defense Fund); *Americans with Disabilities Act: Hearing before the House of Representatives Comm. on Small Business*, 101st Cong. 134 (1990) (testimony of Arlene B. Mayerson, Disability Rights Education and Defense Fund).

[6] *Americans with Disabilities Act of 1989: Hearings before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong. 383 (1989) (prepared statement of the National Coalition for Cancer Survivorship).

Disproving such concerns, the Metropolitan Life Insurance Company presented to Congress a report documenting that employees with cancer histories have work records of comparable caliber to those without a history of cancer.[7]

Taken together, these references in the legislative history show that Congress thoroughly considered irrational discrimination against persons with cancer and reasonably concluded that remedial legislation was warranted.

C. The Legislative History Shows That Congress Considered Evidence Of State Action Against Persons With Cancer

The legislative history also shows that Congress considered evidence of state-sponsored discrimination against persons with cancer. For example, in 1989, ACS presented to Congress evidence that the State of California discriminated against job applicants for an average period of five years after treatment for cancer. In part, ACS found that "discrimination by employers stemmed from concerns that applicants with cancer, or a history of cancer, might not survive long enough to justify the training, that they might need extended periods of sick leave, and that they would cause increases in the cost of health insurance."[8]

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[7] *See Hearing on H.R. 2273, The Americans With Disabilities Act of 1989: Joint Hearing Before the House of Representatives Subcomm. on Education and Labor*, 101st Cong. 88 (1989) (statement of Arlene B. Mayerson, Disability Rights Education and Defense Fund); *Americans with Disabilities Act: Hearing before the House of Representatives Comm. on Small Business*, 101st Cong. 134 (1990) (testimony of Arlene B. Mayerson, Disability Rights Education and Defense Fund).

[8] *Hearing on H.R. 2273, The Americans With Disabilities Act of 1989: Joint Hearing Before the House of Representatives Subcomm. on Education and Labor*, 101st Cong. 87-88 (1989) (statement of Arlene B. Mayerson, Disability Rights Education and Defense Fund) (citing R.

(Footnote cont'd on next page)

In spite of this evidence, Petitioners argue that before enacting the ADA, Congress did not identify a pattern of prior constitutional violations by the states. To support this assertion, Petitioners cite a variety of state statutes intended to address discrimination. In essence, Petitioners argue that the mere existence of these statutes proves beyond doubt that states could not have discriminated against persons with disabilities. But the legislative record reflects that these statutes were so inadequate that national legislation was required to protect persons with disabilities. In fact, the record shows that after hearing evidence of state discrimination, Congress concluded that "[t]he . . . inconsistent treatment of people with disabilities by different State or local government agencies is both inequitable and illogical for a society committed to full access for people with disabilities." H.R. Rep. No. 101-485, pt. 2, at 37. The statutes Petitioners cite created, at best, "an inadequate patchwork of state laws for potential relief."[9] Congress concluded that the wide gaps in state law left states free to discriminate unconstitutionally against disabled persons and determined that remedial legislation was necessary and appropriate.

(Footnote cont'd from previous page.)

McKenna, *Employability and Insurability of the Cancer Patient*, 2-3 (Nov. 25, 1974)); *Americans with Disabilities Act: Hearing before the House of Representatives Comm. on Small Business*, 101st Cong. 133 (1990) (testimony of Arlene B. Mayerson, Disability Rights Education and Defense Fund) (citing R. McKenna, *Employability and Insurability of the Cancer Patient*, 2-3 (Nov. 25, 1974)).

[9] *Americans with Disabilities Act of 1989: Hearings before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong. 388 (1989) (prepared statement of the National Coalition for Cancer Survivorship).

Indeed, notwithstanding these state statutes, employment discrimination continues to be an issue of significant concern to cancer survivors. Similarly, ACS estimates receiving up to three calls per month from cancer survivors describing employment discrimination they have faced.[10] As a result of this discrimination, employees continue to file lawsuits seeking to redress discrimination based on cancer histories. Congress' view that the state statutes were inadequate has been borne out.

III. EVIDENCE OUTSIDE OF THE LEGISLATIVE RECORD ALSO PROVES THAT THE ADA WAS APPROPRIATE REMEDIAL LEGISLATION

In *Turner Broadcasting System, Inc. v. Federal Communications Commission*, the Court confirmed that it is appropriate to consider evidence outside of the legislative record in evaluating Congress' exercise of legislative power. 520 U.S. 180, 200, 209, 211-13 (1997). Evidence outside of the legislative record proves that the ADA was appropriate remedial legislation.

In *Turner*, the Court considered Congress' enactment of the Cable Television Consumer Protection and Competition Act. The Court evaluated "evidence assembled on remand" consisting of expert submissions, studies and sworn testimony to determine whether Congress had identified a sufficient governmental interest to allow it to impinge on various corporations' first amendment rights. 520 U.S. at 208-09. In the Court's view, this evidence outside of the legislative record confirmed that Congress acted reasonably by furthering an important governmental interest. In its ruling,

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[10] Letter from Lisa Guzman, American Cancer Society, to Michael Johnson and Juliet Burnette, American Cancer Society (June 6, 2000).

the Court noted that Congress is not obligated to record in the legislative record the kind of detail required of an administrative agency, and said inclusion of such detail wholly within the legislative record is "constitutionally unwarranted." *Id.* at 213.

As described below, evidence outside of the legislative record proves that Congress exercised sound judgment in deciding that legislation was needed to remedy discrimination against disabled persons.

A. Evidence Regarding Pervasive Discrimination By States Against Persons With Cancer

When the 101st Congress enacted the ADA, studies abounded concerning discrimination against cancer patients. Much of this evidence was considered in connection with legislation proposed in the 99th and 100th Congresses, many of whose members were part of the 101st Congress. Under *Turner*, Congress could have considered this evidence without being obligated to include it in the ADA's legislative record. Evidence presented to Congress in connection with these prior bills demonstrates that when it passed the ADA, Congress acted appropriately to remedy and prevent widespread state-sponsored discrimination against persons with cancer.

For example, when considering an employment discrimination bill in the mid-1980s, the 99th Congress specifically considered evidence of state discrimination against those with cancer. The Institute on Social Oncology presented evidence that discrimination against persons with cancer histories "is more prevalent in the public sector," including

instances of discrimination by boards of education, the military, and Government agencies.[11]

Similarly, in 1986, the same Congress considered pervasive discrimination by the public sector against persons with cancer histories, stating that "both public and private employers have been guilty of employment discrimination against employees with a cancer history, notwithstanding studies and thousands of case histories showing individuals with a history of cancer to be as productive as other employees." H.R. Rep. No. 99-774, at 2 (1986). The Committee noted in the report that such discrimination stems from false beliefs about cancer survivors and is extremely costly to society. *See id.* That same year, the House Committee on Education and Labor of the 99th Congress issued a report on a concurrent resolution (H. Con. Res. 321) expressing Congress's sense of "opposition to employment discrimination against persons who have, or have had, cancer[,] based on such individual's cancer history." *Id.* at 1. The report noted that over one million Americans face discrimination in the forms of "job denial, wage reduction, exclusion from and reduction in employee benefits, promotion denial, and in some cases, outright dismissal." *Id.* at 1-2.

In 1987, the 100th Congress also evaluated evidence of discrimination by public entities, this time by the New York Civil Service Commission in Nassau County, New York. An applicant who had applied to the Commission for a job on the New York police force was rejected because he had a

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[11] *Employment Discrimination Against Cancer Victims and the Handicapped: Hearing before the House of Representatives Subcomm. on Employment Opportunities of the Comm. on Education and Labor*, 99th Cong. 57 (1985) (statement by Dr. Ivan Barofsky, from the Institute of Social Oncology).

history of cancer. Even though he had been free of cancer for ten years, and had passed all of the requisite physical and psychological tests, the Commission rejected him. The Commission's medical requirement automatically disqualified anyone with a history of a malignant tumor.[12]

These were not isolated events. The United States Coast Guard, the New York Highway Department, and the Peace Corps also had discriminated against cancer survivors.[13] Taken together, the evidence demonstrates a pattern and practice of unconstitutional discrimination against persons with cancer.

B. Evidence Regarding Irrational Discrimination Against Persons With Cancer

Evidence presented in connection with prior bills considered by the 99th and 100th Congress also shows that employers discriminated against cancer patients based on myths, unfounded fears, and ignorance of how cancer affects the body. This was true even for patients who had long since recovered from cancer. In fact, one House Report noted that, "[a]lthough sixty-five percent of [patients who suffered from childhood leukemia] are able to lead a normal life after

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12 *See Hearing on Discrimination Against Cancer Victims and the Handicapped: Hearing Before the House of Representatives Subcomm. On Employment Opportunities of the Comm. on Education and Labor*, 100th Cong. 61-62, 71 (1987) (statement of Timothy Calonita, former cancer patient).

13 *See Employment Discrimination Against Cancer Victims and the Handicapped: Hearing before the House of Representatives Subcomm. on Employment Opportunities of the Comm. on Education and Labor*, 99th Cong. 6-7 (1985) (prepared statement of Robert McKenna, M.D., President, American Cancer Society).

treatment, many schools deny them entry simply based on a cancer history."[14]

The information considered by Congress showed that despite medical evidence to the contrary, employers discriminated against cancer patients, believing that cancer caused imminent death, that it was contagious, and that cancer survivors were unproductive workers. This discrimination had no scientific or medical basis and no connection to worker productivity or performance.[15] Direct evidence presented to Congress proved that in reality, survival rates of cancer patients under the age of fifty-five are over eighty percent, cancer cannot be transferred in the workplace, and cancer survivors have the same productivity rates as other workers.[16] Supporting these statistics, a study of employees of the Metropolitan Life Insurance Company found that:

> 1. The turnover rate among employees with a cancer history was no higher than the rate of people cancer-free.
>
> 2. No employee in the cancer group was discharged for absenteeism or poor performance.
>
> 3. Only three percent of the cancer employees were ever placed on disability.[17]

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[14] *Hearing on Discrimination Against Cancer Victims and the Handicapped: Hearing Before the House of Representatives Subcomm. On Employment Opportunities of the Comm. on Education and Labor*, 100th Cong. 32 (1987) (prepared statement by Mario Biaggi, Representative).

[15] *See id.* at 41-42 (prepared statement of Barbara Hoffman, National Coalition for Cancer Survivorship).

[16] *See id.*

[17] *Id.* at 33 (prepared statement by Mario Biaggi, Representative).

The information presented to Congress showed that breast cancer patients were particularly vulnerable to baseless discrimination, even after having recovered from cancer. For example, the 99th Congress considered testimony indicating that approximately one out of four breast cancer patients who could be considered recovered were having employment problems. The ratio was even higher among those who were less than five years past diagnosis. [18] Because of their breast cancer, these patients were denied employment, fired from their jobs, or denied promotions.[19]

Before the same Congress, numerous witnesses testified about the prevalence of such discrimination against cancer patients.[20] In fact, prior to the enactment of the ADA, discrimination was so widespread that ACS estimated that one million of the five million people with cancer or a history of cancer faced some sort of employment discrimination.[21] In addition, this discrimination spanned blue collar and white collar employment. A study by a University of Southern California professor indicated that "half of cancer patients in white-collar jobs and 84% of those in blue collar occupations

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[18] *Employment Discrimination Against Cancer Victims and the Handicapped: Hearing before the House of Representatives Subcomm. on Employment Opportunities of the Comm. on Education and Labor*, 99th Cong. 11-12 (1985) (prepared statement of Sarah Splaver, Ph.D., President of Cancer Hopefuls United for Mutual Support).

[19] *Id.* at 12.

[20] *Id.* at 2-73.

[21] *See Hearing on Discrimination Against Cancer Victims and the Handicapped: Hearing Before the House of Representatives Subcomm. On Employment Opportunities of the Comm. on Education and Labor*, 100th Cong. 2 (1987) (statement of Mathew Martinez, chairman of the subcommittee); *id.* at 41 (prepared statement of Barbara Hoffman, National Coalition for Cancer Survivorship).

suffered some kind of discrimination when they returned to work."[22]

Finally, prior to passage of the ADA, Congress heard evidence that even though cancer patients were becoming a larger part of the workforce, no current law protected them from discrimination because they were not "handicapped" as defined under the Rehabilitation Act of 1973.[23] As a result, cancer patients who lost their jobs due to cancer were generally forced to lie about their medical histories when they sought other employment.[24] This situation pointed to the need for federal legislation to remedy discrimination against persons with cancer.

C. Evidence From Studies Demonstrating Discrimination Against Persons With Cancer

At the time the Congress passed the ADA, publicly available studies also demonstrated that discrimination against cancer pervaded society. These studies mirror the

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[22] *Employment Discrimination Against Cancer Victims and the Handicapped: Hearing before the House of Representatives Subcomm. on Employment Opportunities of the Comm. on Education and Labor*, 99th Cong. 6 (1985) (prepared statement of Representative Mario Biaggi) (referring to study by Dr. Frances Feldman, a University of Southern California professor); *see id* at 19 (prepared statement of Robert McKenna, M.D., President, American Cancer Society) (citing Feldman, F.L. Work and Cancer Health Histories: A Study of the Experiences of Recovered Patients – White Collar Study. San Francisco American Cancer Society, 1976; Feldman, F.L. Work and Cancer Health Histories: A Study of the Experiences of Recovered Patients-Blue Collar Study. San Francisco American Cancer Society, 1976).

[23] *See id.* at 31 (prepared statement of Michael Spekter, Board of Directors, the Alliance for Cancer Patients and their Families).

[24] *See id.* at 12 (prepared statement of Sarah Splaver, Ph.D., President of Cancer Hopefuls United for Mutual Support).

results of those in the ADA's legislative record. For instance, three years before Congress passed the ADA, one study showed that as many as ninety percent of cancer survivors faced some form of discrimination in the work place.[25] As another example, a 1985 Stanford University study of 403 Hodgkin's disease survivors found that forty-three percent of them experienced difficulties at work that they attributed to their cancer histories.[26]

Another 1985 study documented that discrimination was state-sponsored. The study pointed out that the nation's largest employer, the military, openly rejected healthy men and women for enlistment solely because of cancer history.[27] The same study discussed discrimination against a woman who had "passed the written and agility tests for admission to the New York Police Department . . . [, and] [d]espite her test performances, was rejected in August 1984, solely because she once had Hodgkin's disease," even though she had been totally free of cancer for more than five years. *Id.* at 8. According to the New York Police Department's own testing

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25 Katherine Streicher, *Cancer Based Employment Discrimination: Whether the Proposed Amendment to Title VII Will Provide An Effective Anti-Discrimination Remedy*, 62 Ind. L.J. 827 (1987) (citing Cal. Gov. Code § 12921 (West 1981) and Vt. Stat. Ann. Tit. 21, § 495).

26 Barbara Hoffman, *Employment Discrimination Based on Cancer History: The Need for Federal Legislation*, 59 Temp. L.Q. 1, 3-4 (1986) (citing P. Fobair, R. Hoppe, J. Bloom, R. Cox, A. Varghese & D. Spiegel, Psychological Problems Among Survivors of Hodgkin's Disease 9 (Aug. 30, 1985) (unpublished manuscript submitted to *Journal of Clinical Oncology*)).

27 *Id.* at 1, 8 (citing Monaco, Socioeconomic Considerations in Childhood Cancer Survival: Society's Obligations 8 (April 1985) (unpublished manuscript)).

standards, she was a healthy, strong, and intelligent woman who was qualified to serve on the force. *Id.*

These are precisely the kind of studies Congress evaluated when enacting the ADA and they further prove that Congress acted appropriately in passing remedial legislation to address pervasive discrimination.

D. Evidence Of Discrimination Against Cancer Patients In Cases Handled By Lower Courts

In all likelihood, at the time the ADA was being considered, Congress was aware that courts were addressing discrimination against cancer patients as well. *See, e.g., Goldsmith v. New York Psychoanalytic Inst.*, 73 A.D.2d 16 (N.Y. App. Div. 1980). In *Goldsmith*, for example, the Court held that "[p]rivate and public industry routinely deny employment to many qualified individuals because of unfounded fears, such as high absenteeism and imminent death." *Id.* In that case, the plaintiff, a cancer survivor, applied for admission to the New York Psychoanalytic Institute, which disapproved the plaintiff's application due to her history of Hodgkin's disease. *Id.* The plaintiff was otherwise highly qualified and received excellent evaluations from the committees reviewing her application. *Id.* Likewise, in *Department of Fair Employment and Housing v. Kinsburg Cotton Oil Co.*, the defendant fired an employee with a cancer history, allegedly due to excessive absenteeism, although the employee had "not missed more work than anyone in the office at that time."[28] These cases prove concretely that persons with cancer were facing irrational

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[28] No. FEP80-81, 1984 CAFEHC LEXIS 18, 25-29 (Cal. Fair Employment and Housing Commission, Dec. 7, 1984) (cited by Barbara Hoffman, *Employment Discrimination Based on Cancer History: The Need for Federal Legislation*, 59 Temp. L.Q. 1, 16 (1986)).

discrimination at the time Congress was considering the ADA.

CONCLUSION

Congress properly invoked its power under Section 5 of the Fourteenth Amendment to remedy unconstitutional discrimination against cancer patients and other disabled persons. Accordingly, the Court should affirm the judgment of the Eleventh Circuit.

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In The
Supreme Court of the United States

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA AND THE ALABAMA DEPARTMENT OF YOUTH SERVICES,

Petitioners,

vs.

PATRICIA GARRETT AND MILTON ASH,

Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

BRIEF OF ALABAMA AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE* [1]

The Alabama *Amici Curiae* are: Southern Poverty Law Center; Individual and Family Support Council of Alabama; Brenda Doss, President, ARC of the United States; People First of Alabama; ARC of Alabama; Co-Dependency Support Group for People with Mental Illness; Birmingham Independent Living Center; Alabama Council of the Blind; Alabama Association of the Deaf, Inc.; Alabama Association for Persons In Supported Employment, Inc.; Mental Health Association in Alabama; National Alliance for the Mentally Ill – Birmingham and Randolph County Chapters; Revelations of Self; Special Education Action Committee, Inc. – State Center; Alabama Head Injury Foundation, Inc.; Mental Health Consumers of Alabama, Inc.; Birmingham Council of the Blind; Mobile Independent Living Center; Family Advocacy and Community Educational Services, Inc.; National Federation of the Blind; United Cerebral Palsy of Greater Birmingham, Inc.; Montgomery Share Group; The New Group -- Montgomery; Individual and Family Support Council, Region II West; Independent Living Center of Walker County; People First – Tuscaloosa, Prattville, Space City, Walker County and Birmingham chapters; Emotions Anonymous; Mental Health Consumers of Alabama in Huntsville; Walker County Individual & Family Support Council. The Alabama *Amici* and their members advocate

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[1] No counsel for any party had any role in authoring this brief, and no persons other than the *amici curiae* and their counsel made any monetary contribution to its preparation or submission. Written consents from the parties to the filing of this brief are on file with the Clerk of the Court.

for equal opportunities and civil rights for persons with disabilities and have an interest in ensuring equal access to state programs and services for persons with disabilities.

Also included in the Alabama *Amici are* Alabama State Employees Association, a state employees' union., and State Employees Local Union 1370, a correctional officers union. Local 1370 believes, contrary to the position taken by Petitioners' *amici* that Alabama's problems with its prison system are not due to the ADA, but rather to lack of personnel and funding.

SUMMARY OF THE ARGUMENT

Justice Brandeis memorably noted a key virtue of shared power between the national and state governments: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Justice Brandeis' insight takes for granted that a state's experiment will be benevolent, "courageous," rather than an experiment on the liberties of its citizens.

Recently, again presuming that states do not experiment on the rights of their citizens, this Court has written, "We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States thus provides an important assurance that '[t]his Constitution, and the laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land." *Alden v. Maine*, 527 U.S. 706, 755 (1998). The

Court made clear, however, that its confidence in the good faith of the states was premised on the fact that many states, on their own initiative, have now waived sovereign immunity in the interest of furthering the rights of citizens: "the rigors of sovereign immunity are thus mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign." *Id.* (internal quotations omitted).

Alabama is not among those states worthy of the Court's faith. Alabama has no general human rights ordinance or equal protection provision.[2] Its sole employment discrimination statute addresses only age discrimination. *See Ala. Code* § 25-1-20 (Supp. 1997). Its Constitution declares, without exception, "The State of Alabama shall never be made a defendant in any court of law or equity." Ala. Const. of 1901, art. 1, § 14.

Since Alabama has declined to mitigate the rigors of sovereign immunity in the interest of justice for its citizens, the question is whether Congress may extend the hand of justice to U.S. citizens living there. This Court has held that Congress may legitimately extend its constitutional hand if there is "proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507 (1997).

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[2] Although the topic of some debate, Alabama's Constitution does not even contain an "equal-protection provision." *Ex parte Melof*, 735 So. 2d 1172, 1181 (Ala. 1999) ("we hold that Alabama has no such "equal-protection provision").

Proportionality naturally depends upon the historical record establishing the scope of the wrong to be cured.[3] If history matters in evaluating Congress' exercise of its remedial powers, it is likewise appropriate, when Alabama seeks a ruling that it may disdain the helping federal hand as intrusive, to examine Alabama's purported efforts to cure its own wrongs and its historical treatment of citizens with disabilities.

Thus, this brief will focus, first, on Alabama's bald claim that it protects the rights of persons with disabilities on a scale that renders federal protections superfluous, and second, on the dismal historical record that belies Alabama's pretensions to Xanadu. Indeed, Alabama's history is one of abdicating the sovereign's duty to provide for the general welfare, then indulging in the fiction that a usurpatious federal government has infringed its dignity, and finally, defying federal orders designed to remedy its abdication.

Federal Judge Frank M. Johnson Jr.[4] described this pattern as the Alabama Federal Intervention Syndrome, otherwise known as the Alabama Punting Syndrome: the

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[3] For instance, the fact that Congress had not cited an example of religious discrimination in the 40 years preceding its enactment of the Religious Freedom Restoration Act was a decisive factor in this Court's determination that Congress had overextended the remedial hand. *City of Boerne*, 521 U.S. at 530.

[4] Judge Johnson was the sole federal district judge sitting in Montgomery throughout the Civil Rights Era and ordered the desegregation of most of Alabama's institutions. *See, e.g.*, Jack Bass, *Taming the Storm: The Life and Times of Judge Frank M. Johnson, Jr. and the South's Fight Over Civil Rights* 1, 2, 88 (1992).

quaint habit of ignoring its responsibilities as a sovereign until faced with a federal court order. Frank M. Johnson, Jr., *The Alabama Punting Syndrome*, THE JUDGE'S JOURNAL Spring 1979, at 5 (hereafter "Johnson"). In the name of states' rights, Judge Johnson said, Alabama generally seeks to relieve itself of federal laws devolving from the Constitution. Johnson at 6. As a former Alabama attorney general has acknowledged, "We holler about the federal courts having too much power. But if you have states' rights, you also have states' responsibilities. The state refused to face up to its responsibilities time and time again. We abdicated our power." *Id.*

Alabama's abdication has consistently resulted in federal court cases that "rarely [come] as a surprise to anyone, because they are generally filed only after the aggrieved parties have exhausted all hope of vindicating their rights through other channels." *Id.* at 6. After federal relief is ordered, Alabama responds with malfeasance, misfeasance, and further machinations.[5]

The Alabama Punting Syndrome has dictated that, without minimal constitutional standards imposed by federal orders, "the state's mentally ill, retarded, and

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[5] For example, when Judge Johnson ordered the city of Montgomery to desegregate public parks, the City concocted a scheme whereby the YMCA operated segregated parks with governmental assistance. *Smith v. Young Men's Christian Ass'n*, 316 F. Supp. 899, 908-09 (M.D. Ala. 1970), *aff'd as modified*, 462 F.2d 634 (5th Cir. 1972). When he ordered desegregation of Macon County schools, state officials passed a "tuition-grant law" that financed a white school system. *Lee v. Macon County Bd. of Educ.*, 231 F. Supp. 743 (M.D. Ala. 1964)(three-judge court).

criminally convicted citizens [have been] involuntarily confined in institutions where conditions justly have been described as barbaric and shocking." *Id.* at 7.[6] The Alabama Punting Syndrome has dictated that the state hospital for mentally ill citizens "warehoused" those who were involuntarily confined, ostensibly for "humane therapeutic reasons," and then failed to provide adequate treatment to the "[m]ore than 5,000 people [who] were crowded into dilapidated facilities and forgotten." *Id.* at 7.

In truth, then, Alabama's mode of discharging its sovereign duty to provide for the welfare of its citizens with disabilities has involved doing little to nothing until sued in federal court and then defying the courts to the edge of contempt. In the face of such a history, it now asks this Court to relieve it of the burden of federal compliance, pledging its good faith. Alabama's history does not inspire confidence in its good faith.

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[6] The Alabama Punting Syndrome is not limited to Alabama's treatment of persons with disabilities in mental hospitals. For example, Alabama prisons within recent memory were justly described as "unrelieved squalor" accompanied by "mindless brutality." Larry W. Yackle, *Reform and Regret: The Story of Federal Judicial Involvement in the Alabama Prison System* 11-12 (1989) (discussing for example an inmate who had trouble controlling his bowels and was confined to an upright wooden bench until he died of gangrene).

In 1997, another federal judge would note the continued vitality of the Alabama Punting Syndrome, in litigation involving abuses in the state's foster care system. *R.C. v. Nachman*, 969 F. Supp. 682, 704 (M.D Ala. 1997).

ARGUMENT

I. ALABAMA DOES NOT OFFER ITS EMPLOYEES WITH DISABILITIES THE SWEEPING PROTECTIONS IT CLAIMS, AND ITS ADMINISTRATIVE RULES, STATUTES, AND "POLICIES" DO NOT AMELIORATE THE RIGORS OF SOVEREIGN IMMUNITY.

A. Alabama Has No Statute That Makes it Illegal to Discriminate in Employment on the Basis of Disability

Despite Petitioners' grandiose claims,[7] the Alabama legislature has never enacted a law protecting Alabama's citizens with disabilities from employment discrimination. Alabama does not have a state civil rights act, a human rights act or any sort of human rights commission. Although nearly 10 percent of its working-age citizens are classified as "disabled,"[8] Alabama has not chosen to insure their rights through legislation and its constitution likewise makes no provision for their protection.

Faced with its utter lack of such legislation, Alabama here relies on an administrative rule promulgated by the State Personnel Board, *Ala. Admin. Code* r. 670-x-4-.01 (1981 & Supp. 1990), contending essentially that the

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[7] Alabama Governor Don Siegelman has publicly stated that he does not agree with the position taken by Petitioners in this case. *See* Mike Cason, "Case divides Governor, AG," Montgomery Advertiser, July 16, 2000, at 1C .

[8] Bureau of Census, U.S Dep't of Commerce, *1990 Census of Population: Social and Economic Characteristics* 182 (1993).

rule is a substitute for the ADA. (*See* Pet. Br. App. A at A1.) It is not, for a variety of reasons.

First, this Personnel Board rule applies only to a subset of state employees – those in the "classified" service – and not to all state employees, as Petitioners claim in their Brief. *See Ala. Admin. Code* § 670-x- 2-.01 (1981 & Supp. 1990). No employee of Alabama's circuit court system, district attorney's offices, legislature, universities, or other public institutions managed by a board of trustees is covered. *Ala. Admin. Code* r. 670-x-3-.01(f)(3) (1981 & Supp. 1990). *See also Ala. Code* § 36-26-10 (1991). In fact, Respondent Patricia Garrett, employed as a Director of Nursing by the University of Alabama, could not bring her claims under r. 670-x-4-.01.

Second, it is far from clear that rule 670-x-4-.03 permits "equitable and monetary relief" as Petitioners claim. (*See* Pet. Br. App. A at A1.) The regulation itself refers only to the aggrieved employee's right to appeal to the Personnel Board which "may take appropriate corrective action." *Id.* However, the related provision describing what actions the Personnel Board may take when an appeal is filed appears to limit the Board's potential actions to "reinstatement with or without pay" or dismissal. *Ala. Admin. Code* r. 670-x-5-.08(8) (1986 & Supp. 1990). The rule makes no mention of any money damages, attorneys' fees, costs or anything else traditionally regarded as "monetary relief"[9] and the

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[9] *See Curtis v. Loether*, 415 U.S. 189, 196 (1974) (contrasting language of a statute that did not permit money damages, limiting the relief to reinstatement "with or without back pay," with

decision of the Personnel Board is final. *Ala. Admin. Code* r. 670-x-4-.03 (1986 & Supp. 1990). This rule in no way serves as a substitute for the ADA

Unlike the ADA, the Personnel Board rule does not impose a duty to reasonably accommodate persons with disabilities or outlaw retaliation. Thus, Alabama's argument that its Administrative Code substitutes for ADA rights is sheerest pretense.

B. Alabama's "Policy" Articulations are Meaningless.

In support of its contention that the ADA is superfluous, Alabama has cited a number of its "policies," as though a "policy" provides affirmative rights to persons with disabilities. (*See* Pet. Apps. A, B.) Elevating these policies to the level of positive law is no more than wishful thinking on Alabama's part. In fact, a number of Alabama's present arguments are contrary to the legal positions it and its political subdivisions have taken in past cases.

Certainly, as a matter of statutory construction a "policy" is founded on "custom, which does not have the standing of statutory law." *Sutherland's Statutory Construction* § 56.01 at 303 (Norman Singer, ed., 6th ed. 2000). In keeping with this legal truism, this Court has specifically noted that, while a state may express a value judgment in hortatory language, such language may not of itself confer a cause of action. *Webster v. Reproductive*

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the language of a statute that clearly did allow the recovery of money damages).

Health Servs., 492 U.S. 490, 506 (1989). Without an enforcement mechanism, a policy is mere talk, worth no more than the paper it is written on.

The history of litigation under Alabama's "policies" bears this out. Indeed, one of the very "policies" Alabama cites (Pet. App. A-1), was held in a case predating the ADA to confer no right of action in the courts. In *Hill v. Shelby County, Ala.*, 599 F. Supp. 303 (1984), the county conceded that a disabled venireperson and defendant in a suit could not climb steps in a courthouse that had no elevator or lift to reach either the upstairs courtroom or the women's restroom. *Hill*, 599 F. Supp. at 303-04. The court construed the provision: "The blind, the visually handicapped and otherwise physically disabled shall have the same rights as the able-bodied to the free and full use of the streets, highways, walkways, public buildings, public facilities and other public places." *Id.* at 305. It found that neither the Alabama Constitution, Article I, § 13 ("all courts shall be open"), nor Alabama Code § 21-7-2 (1975) created any right of action: "Legislative recognition of a general, salutary public policy does not, without specific intent to do so, create a state liberty or property right ..." *Id.* at 305.[10]

Writing in 1984, having concluded that state law provided no right of physical access to Alabama's courtrooms, the *Hill* court held that the unfortunate plaintiff had no standing to sue "unless and until the

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[10] To this day, the Alabama statute forbidding discrimination in jury selection does not include protection from discrimination based on disability. *See Ala. Code* § 12-16-56 (1975).

Congress of the United States specifically requires elevator access to all State courtrooms, jury deliberation rooms, and restrooms. The Congress has not yet seen fit to require this." *Id.* at 305.[11]

After passage of the ADA, local courts still did not construe Alabama Code § 21-7-8's similar "policy" pronouncement to confer a right of action. In *Ethridge v. State of Alabama*, 847 F. Supp. 903 (M.D. Ala. 1993), Alabama specifically argued that Alabama Code § 21-7-8 did not create a private right of action. *Ethridge*, 847 F. Supp. at 907-08. The language before the *Ethridge* court, which Alabama contended gave no redress, was: "It is the policy of this state that the blind, the visually handicapped and the otherwise disabled shall be employed in the state service... on the same terms and conditions as the able-bodied, unless it is shown that the particular disability prevents the performance of the work involved." 847 F. Supp. at 908. The *Ethridge* court agreed that the policy created no enforceable right.

Likewise, Petitioners today cite the existence of two Code provisions granting a preference to blind persons to operate vending machines on state property as evidence of Alabama's solicitude toward persons with disabilities. Yet twenty years ago, Petitioner University of Alabama was in

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[11] Despite the passage of the ADA and the existence of Alabama "policies," as of April 2000, none of Alabama's 67 courthouses is in compliance with federal law, and none is completely accessible to persons with disabilities. *Update: Access to Justice*, Airmail, May, 2000, at 4-5. Alabama's State Capitol building is also not wheelchair accessible. *See* Mike Cason, "Advocates See Progress, But Fight Continues," Montgomery Advertiser, July 16, 2000 at 1A.

court arguing that it should be allowed to disregard the literal terms of the statute and impose its own criteria. It won, and the Alabama Supreme Court held that state agencies are free to prescribe their own "reasonable restrictions on the grant of the privilege." *Gundy v. Ozier*, 409 So. 2d 764 (1981). The *Gundy* court also held that Alabama Code Sections 21-1-40 and 41 do not confer an absolute preference, and moreover, legislative grants of privilege are construed strictly against the claim of the person seeking them. *Gundy*, 409 So. 2d at 766-67.

In a like vein, today Petitioner University of Alabama lists its own grievance procedures as one of the "Current Alabama Programs, Laws and Policies to Promote, Assist and Protect Persons with Disabilities." (Pet. App. B at B-1.)Yet 17 years ago it won a ruling from the Alabama Supreme Court that it was not obligated to honor the findings of its grievance committee and could fire its employees despite the committee's recommendation.[12] *Carter v. Board of Trustees of Univ. of Ala. at Birmingham*, 431 So. 2d 529, 530 (Ala. 1983).

Another Code provision touted by Alabama is its disabilities "hotline," a 1-800 number staffed by a Deputy Attorney General. (*See* Pet. App. B-3.) Ironically, Alabama's hotline, effective July 1, 1998, exists to "provide information on the rights and responsibilities under the Americans with Disabilities Act." Department of

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[12] As discussed below, the Alabama Supreme Court also held that the aggrieved employee could not sue Petitioner over his termination because the University was immune from suit. *Carter*, 431 So. 2d at 531.

Rehabilitation Servs. Quarterly Report, § VIII (April-June 2000) . *See also Ala. Code* § 21-9-14 (Supp. 1998). Thus, Alabama's Attorney General, who here argues that the ADA does not apply to the states, must appoint one deputy from his office to provide "public information," "referral, training, data collection, and analysis" on that very statute. *Ala. Code* § 21-9-14 (a) (Supp. 1998).[13] Tellingly, the hotline does not exist to provide information about Alabama's own "programs, laws and policies" – a tacit admission by the State of where protection for the rights of persons with disabilities can actually be found.

Alabama likewise boasts about Code sections 21-7-9 and -10 (App. B-4), but these housing provisions rest on air. Section 21-7-9 (1975) expressly provides: "Nothing in this section shall require any person renting, leasing or providing real property to modify his property in any way or provide a higher degree of care for a blind person, visually handicapped person or other physically disabled person" than for a person who is not. This Code provision is thus as efficacious as § 21-7-10 (1975), requiring the Governor to issue a "White Cane Safety Day" proclamation. The proclamation is a salutary gesture, but a gesture only, much like Alabama's non-actionable "policies" it wishes this Court to credit as a substitute for

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[13] The "hotline" attendant is given no enforcement powers but is charged only with reporting about "confidential" complaints to selected state officials. *Ala. Code* § 21-9-14 (b) (Supp. 1998). The lack of enforcement power is testament to Alabama's window-dressing purpose.

ADA rights.[14]

Alabama also suggests that it has expansive policies favoring deinstitutionalization and the least restrictive environment for mentally ill and mentally retarded citizens. (*See* Pet. Apps. A-1, B-6). It ignores the fact that its codification of civil commitment protections was not its own inspiration, but mandated by pre-existing federal court orders. *Compare Ala. Code* § 22-52-37 (1975) *with* discussion *infra* at II.B.[15]

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[14] Two additional statutes similarly give with one hand while taking away with the other, thereby creating a favorable first impression, but lacking real teeth. Both Alabama's Mental Health Consumers' Rights Act, *Ala. Code* § 22-56-1 *et seq.* (Supp. 1995) and its Bill of Rights for Persons with Developmental Disabilities and Traumatic Brain Injury, *Ala. Code* § 38-9C-1 *et seq.* (Supp. 1995), purport to grant "[t]he right to enforce rights in a court of competent jurisdiction or appropriate administrative proceeding." These putative waivers are undone, however, by the final provisions, which effectively reestablish the status quo: "[N]othing in this chapter shall reduce or expand the rights of mental health consumers in Alabama beyond the rights guaranteed to any other person under the statutes or Constitution of the United States and Alabama statutes or Constitution of 1901." *Ala. Code* § 22-56-10 (Supp. 1995); *Ala. Code* § 38-9C-8 (Supp. 1995). In addition, both statutes effectively exclude private providers from liability for anything other than malpractice. *See Ala. Code* §§ 22-56-2(7), 22-56-4(14), 22-56-8 (1975) *and Ala. Code* § 38-9C-3 (3) (Supp. 1995).

[15] Much the same could be said for Alabama's Mental Health Consumers' Rights Act. Almost every provision of that Act embodies the standards already set forth by the federal court during 30 years of litigation over conditions of confinement in Alabama state institutions. (*See infra* at II.B.)

C. Alabama's Constitutional Sovereign Immunity Provision Precludes the Legislature From Enacting a State Law Like the ADA.

Even assuming that Alabama's legislature were ever inclined to enact a law similar to the ADA, such a statute would be subject to attack as violative of Alabama's Constitution. Alabama's Constitution provides that "the State of Alabama shall never be made a defendant in any court of law or equity." Ala. Const. of 1901, Art. I, § 14. Alabama has steadfastly refused to relinquish one iota of its constitutionally mandated immunity.

Alabama case law holds that section 14 says what it appears to say. As Petitioner University of Alabama successfully argued, under § 14, it is wholly immune from lawsuits by its employees over their allegedly wrongful terminations. *Carter*, 413 So. 2d at 531 (UAB shares the state's constitutional immunity). As Justice Maddox wrote in 1971: "The wall of 'governmental immunity' is almost invincible, made so by the people through their Constitution as interpreted by this Court."[16] *Hutchinson v. Board of Trustees of Univ. of Ala.*, 288 Ala. 20, 256 So. 2d 281 (1971). Nor has the Alabama Supreme Court altered its position on this point in the intervening 30 years. Writing this summer, the court observed that "neither the

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[16] In fact, Alabama law does allow limited exceptions to this blanket statement, but no exception is wide enough to allow relief similar to that afforded by the ADA. *See Cranman*, Case No. 1971903, 2000 Ala. LEXIS 273 at * 6 & n.9 (Ala. June 16, 2000); *Wallace v. Malone*, 279 Ala. 93, 98, 182 So. 2d 360, 363 (1964).

legislature nor this Court has the power to waive the State's immunity from suit." *Ex parte Cranman*, Case No. 1971903, 2000 Ala. LEXIS 273 at * 16 (Ala. June 16, 2000). [17]

This constitutional provision is no mere historical holdover. During the 2000 legislative session, a bill was introduced in Alabama's House of Representatives proposing a constitutional amendment that would have allowed the Legislature to "direct in what manner, in what courts, and in what cases suits may be brought against the states and its political subdivisions." H.B. 191, 2000 Regular Leg. Sess. (Ala. March 21, 2000).[18] While the bill was in committee, the amendment was excised and the original 1901 language was restored. When the revised bill came to a vote on March 21, 2000, the Alabama House of Representatives unanimously voted to retain the 1901 provision. *Id.*

D. Alabama Failed to Cite the Statutes that Enshrine Its Discrimination Against Persons with Disabilities.

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[17] The *Cranman* court interpreted Alabama's Constitution as permitting suits against state actors in their individual capacity, but explicitly allowed those state agents to retain discretionary immunity for "hiring, firing, transferring, assigning or supervising personnel." *Cranman*, Case No. 1971903, 2000 Ala. LEXIS 273 at * 36. Previous case law suggests that the immunity afforded the state by section 14 for employment-related lawsuits cannot be avoided by suing officials or agents individually. *Carter*, 431 So. 2d at 531.

[18] This language would have mirrored, for example, that of Arizona's law.

The charts found in Appendices A and B to Petitioners' Brief purport to detail all of Alabama's laws regarding the rights of persons with disabilities. However, the provisions Alabama did not articulate speak volumes.

Alabama did not call attention to its blanket prohibition of a boating license to an "insane" person, an "idiot," a "feeble-minded" person or "any person afflicted with or suffering from a physical or mental disability." *Ala. Code* § 33-5-57 (Supp. 1994). Other Code provisions not cited by Alabama reference "lunatics" or "insane" people and "idiots." *See, e.g., Ala. Code* §§ 1-1-1 (5) (1975), 11-12-8 (1975), 12-21-165 (a) (1975), 6-2-8 (1975 & Supp. 1996), 6-2-41 (1975), 6-4-21 (1975), and 15-16-22 (1975). Alabama still provides for acquisition or construction of "insane asylums" along with "poorhouses," "workhouses," and "convict camps." *Ala. Code* §§ 11-81-80 (1975), 14-6-106 (1975 & Supp. 1979). Until 1996 its Constitution denied the franchise to "idiots and insane persons," without qualification. *See Ala. Const.* of 1901, art. 8, § 182 (as amended).[19] These are not proud words, and if Alabama directs this Court to gestures and policies, the value judgments embodied in its pejorative language should be weighed as well.

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[19] Even this revision was not undertaken by Alabama of its own volition, but was a byproduct of the general overhaul mandated by this Court's decision in *Hunter v. Underwood,* 471 U.S. 222 (1985) (striking Alabama's constitutional provision denying voting rights to misdemeanants for "crimes of moral turpitude" including miscegenation; "tramp[s]" and "idiots and insane persons" were similarly disenfranchised).

II. ALABAMA HAS TAKEN A PROUD STAND IN DEFENSE OF ITS "DIGNITY" HERE, BUT ITS HISTORIC TREATMENT OF ITS CITIZENS WITH DISABILITIES IS NOTHING TO BE PROUD OF.

Petitioners turn to the historical record in support of their claims for immunity. (Pet. Br. at 6-7).[20] They point to isolated incidents from Alabama's past as evidence of Alabama's benevolence towards persons with disabilities. (Pet. Br. at 7-10.) Having called on history, they cannot be heard to complain when history answers. In particular, Alabama's historical treatment of the mentally ill and mentally retarded offers a sharp rejoinder to Alabama's averments of good faith and good will.

Amici do not detail this history because they nurture a grudge for Alabama's past sins, but because Alabama, when left to its own devices, has consistently refused to do its duty by its citizens with disabilities. When finally faced with federal standards, Alabama spent the next 30 years trying to wriggle out of them. Only at the beginning of a new century did Alabama agree to meet the previous

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[20] Alabama is right about one thing – its "state's rights" argument is not new. In 1854, Congress passed a land-grant bill for construction of mental hospitals which President Franklin Pierce vetoed on the ground that "Congress did not have this power to usurp states' rights – even in defense of human rights." *Action for Mental Health, Final Rep. of Joint Comm'n on Mental Illness and Health* 286 (1961). In fact, when Alabama attempted to enact its first comprehensive mental health statute, it identified "anti-Federalism" as one of the primary obstacles to reform. *Alabama Mental Health Plan* 1 (Sept. 1, 1965) (hereafter "Plan").

century's standards. *See Wyatt v. Sawyer*, 2000 U.S. Dist. LEXIS 10398 (M.D. Ala. July 13, 2000).

A. The Past is Prologue: Mental Health in Alabama from the 1860s to the 1960s.

In 1854, the indomitable Dorothea Dix came to Alabama to lead the effort to establish a state mental hospital. Her lone crusade prompted a state legislator to acknowledge, in the language of his time:

> [W]e must admit [the] lamentable fact that the state of Alabama, one of Heaven's most favored social communities whose population claim[s] to be recognized as a Christian and civilized people, alive and adequate to all the purposes of self-government, has existed as a sovereign state for thirty years, and yet she has wholly... neglected to perform one of the first moral, social, and religious duties -- that pleasing duty of charity to the afflicted.

Katherine Vickery, *A History of Mental Health in Alabama* 22 (1965). Ms. Dix's campaign resulted in the passage of a law establishing Alabama's first mental health facility,[21] but this law hardly represented a discharge of the

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[21] This is today known as "Bryce Hospital," named after its first superintendent. The facility for black patients, formerly known as Mount Vernon, is today in existence as an integrated facility called "Searcy Hospital." In 1921, Alabama established a facility for white developmentally disabled patients which eventually became known as "Partlow State School and Hospital." *Amici* use the contemporary names for these facilities.

"moral, social and religious duties" Alabama owed its citizens. Instead it heralded the beginning of a 100-year reign of misfeasance and nonfeasance, accomplished through willfully inadequate funding, lack of oversight, and indifference toward the rights of Alabama's citizens with mental disabilities. The sampling of problems below barely scratches the surface:

Lack of Funding

- Twenty years after establishing Ms. Dix's hospital, Alabama had still failed to appropriate any funds for it. Vickery at 40.
- In 1918, the state appropriated for the health of farm animals more than twice what it appropriated for human health. Hastings H. Hart, Russell Sage Foundation, *Social Problems of Alabama*, 11 (1918) (hereafter "Hart (1918)"). Alabama's appropriations for public health generally were less than one-fourth the national average, and only one other Southern state appropriated as little in proportion to its population. Hart (1918) at 33. Little changed in the next 40 years. In 1960, Bryce and Searcy received $2.50 daily per patient while the national average was $4.06. In 1960, the Birmingham Zoo spent more than $2.50 a day feeding one lion or tiger. Vickery at 288 (quoting Charles Morgan, *Mindpower* 1-4 (1959-60)).
- State highway allocations during the years 1945-65 fluctuated from 15.2% to 28.5 % of the budget; education expenditures fluctuated from 27.6% to 36.7%; and pension expenditures fluctuated from 2.9% to 4.3% but mental health never gained in all

of those years more than 1.7% of appropriations from the state treasury. *Alabama Mental Health Plan (A Condensed Version)* 43 (Feb. 1966).

- In 1964, Bryce and Searcy operated on a $3.00 per day, per patient allotment for food, clothing, housing and treatment. Partlow subsisted on $3.05. James Sidney Tarwater, *The Alabama State Hospitals and the Partlow State School and Hospital: A Brief History* 28 (1964) . These levels were the same as they had been in 1935, despite interim inflation. *See Report of the Trustees of the Alabama Insane Hospitals, Annual Rep. of Superintendent* 85 (1935) (hereafter "1935 Rep.").
- In 1966, after passage of the controversial Mental Health Act, Alabama still spent only 62% of the national average on mental health -- as it had for the preceding 20 years. Plan at 74, 76. Its *per diem* of $3.20 was acknowledged by the state to be "possibly the lowest in the nation." Plan at 2.

Improper Classification or Total Lack of Facilities

- From the beginning, aged, epileptic, paralyzed, and malarial patients were thrown into the pot with those classified as "imbeciles" or "idiots," almost one-tenth of them dying in the year 1869. Vickery at 41.[22] 100 years later, inappropriate placement

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[22] The physically ill fared no better. The tuberculosis hospital in Wetumpka was a penitentiary, and all the nurses and staff were inmates. "It is rather extraordinary," a study noted, "that citizens of Alabama who need public treatment can obtain it only by getting themselves committed to the penitentiary." Hart (1918) at 22.

was "more appallingly acute than ever before in the history" of Searcy and Partlow. Tarwater at 26.

- By 1918, Bryce still had no separate wards for sick and surgical cases or tubercular patients. Hart (1918) at 25.
- The hospital for "feebleminded" children was not constructed until 1921– 100 years after statehood – and then only admitted white patients. Hastings H. Hart, Russell Sage Foundation, *Social Progress of Alabama*, 14-15 (1922).
- Mentally ill prisoners were often thrown in with the general population rather than referred to the hospital, Vickery at 15, and conversely, "criminally insane" prisoners were often sent to the hospital. Tarwater at 13.A class action involving prisoner classification pends today. *Bradley v. Harrelson*, CV-92-A-70-N (M.D. Ala.).
- Alabama continued to place developmentally disabled and physically ill persons in the mentally ill population for 100 years. In the 1960s, Bryce and Searcy were still complaining of inappropriate placement of mentally retarded patients there. *See, e.g., Rep. of the Trustees of the Alabama State Hospitals to the Governor*, 74, 76 (1964) (hereafter "1964 Rep.").

Forced Sterilization

- In 1932, experts recommended segregation and sterilization for this "predatory class"-- the developmentally disabled. Vickery at 98.
- That same year, Partlow's Superintendent reported, "We are yet observing the rule of sterilizing all who

are dismissed. Up to the present time there ha[ve] been sterilized in the institution 129 cases, including 73 males and 56 females." *Report of the Alabama Insane Hospitals to the Governor,* § 4, at 88, 91 (1932).

- In 1935, Partlow trustees voiced support for an involuntary sterilization bill. 1935 Rep. § 4, at 89. *See also In re Opinion of the Justices,* No. 32, 230 Ala. 543, 162 So. 2d 123 (1935) (sterilization not cruel and unusual punishment for confined persons, if sufficient procedure provided). Alabama's involuntary sterilization law was finally struck in 1973. *Wyatt v. Aderholt*, 368 F. Supp. 1382 (M.D. Ala. 1973) (three-judge court).

Overcrowding/Understaffing

- In 1902 there were 372 patients at Searcy, and only one physician, and at Bryce there were four physicians and one intern for 1,206 patients. Tarwater at 21.
- Alabama superintendents complained of like overcrowding and staffing ratios for the succeeding 62 years. *See, e.g.*, 1964 Rep. at 74, 76. In 1964, the Superintendent of State Hospitals concluded that overcrowding was "more appallingly acute than ever before in the history of" Partlow and Searcy. Tarwater at 26.
- In 1943, understaffed Bryce actually had a women's ward which the patients ran. Vickery at 176.
- In the 1970s, Alabama's facilities were still described as "overcrowded, plagued by fire and other emergency hazards" and falling short of

humane standards for treatment because of these problems – just as they had been in the first three decades of the century. *Compare Wyatt v. aff'd in relevant part*, 503 F.2d 1305 (5th Cir. 1974), 344 F. Supp. 373, 381 (M.D. Ala. 1972) *with* 1935 Rep. at 85-86.

Physical Abuse of Patients

- In 1870, in an effort to curb patient abuse, the Superintendent of Bryce resorted to fining employees for their abusive treatment of patients. Vickery at 47.
- Nonjudicial efforts evidently failed, as patient abuse was "widespread" at Alabama's mental health facilities during the 1990s, more than 120 years later. *See Wyatt v. Rogers*, 985 F. Supp. 1356, 1377-78 (M.D. Ala. 1997) ("[s]taff members punch, hit, and kick defenseless mentally-retarded residents").
- A skeletal sampling[23] of 1990s physical abuse in Alabama's mental health system includes: (1) an incident at Searcy where a staff member jumped a mentally retarded patient, kicking her stomach and genitals while patients and staff cheered, *id.* at 1397; (2) a mentally ill patient abused to the extent that he had 40 injuries over approximately four years, including beatings by staff with a clipboard

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[23] For example, there were 240 incidents of physical abuse from November 1990-August 1993 at one Alabama facility alone. *Id.* at 1375.

to the head, necessitating 14 sutures, and beatings by staff with coathangers, *id.* at 1397-98; (3) a mentally retarded patient who bled to death after a beating by another resident while staff was "unavailable," *id.* at 1420; and (4) a staff member repeatedly striking a mentally retarded resident on the head with a 2x4 with bolts protruding from its sides, *id.* at n. 306.

- Dignitary injuries occurred as well, as when a staff member was found bouncing a ball off a resident's head for fun. *Id.* at n. 306.

Lack of Treatment/Warehousing

- In 1907, a Commission investigating scandals at Bryce described it as "a dumping ground for old, feeble, decrepit men and women afflicted with some mental and all sorts of physical ailments," and opined that, to relieve overcrowding, they should be turned to the county almshouses, where they would likewise receive "no medical or systematic treatment." Vickery at 74. *See also* Tarwater at 24.
- 70 years later, Bryce, Partlow and Searcy were still confining persons with mental disabilities without treatment. *Wyatt v. Stickney*, 334 F. Supp. 1341, 1344 (M.D. Ala. 1971). The *Wyatt* court found physical and therapeutic conditions deplorable, describing shoddily clothed patients living in barn-like structures that afforded no privacy, doing non-therapeutic work and receiving treatment for the convenience of the housekeeping staff rather than for their own good. *Id.* at 1343-44.

- In the 1990s, the facility for adolescents used solitary confinement in lieu of treatment: "Children were placed in a row of cells, with no fixtures other than a light, a cement floor, and little-to-no heat or air-conditioning." *Wyatt v. Rogers*, 985 F. Supp. at 1378.

B. Alabama's Abdications Catch Up with It.

When confronted with the facts detailed above, Alabama's response was not what this Court anticipated in *Alden* – a rush to conform its conduct to federal requirements. *Alden*, 527 U.S. at 755. Instead, Alabama did everything within its power to avoid having to abide by the minimum standards of federal and constitutional law.

In the landmark *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), the federal court found that Bryce used "scientifically and medically inadequate" treatment programs for involuntarily confined citizens. *Wyatt*, 325 F. Supp. at 784. It ordered Alabama to develop and implement, within six months, a treatment program that met constitutional standards. *Id.* at 785. Nine months later, Alabama had made "wholly inadequate" progress. *Wyatt v. Stickney*, 334 F. Supp. at 1344.

Accordingly, the court in 1972 enjoined Alabama officials to bring facilities into compliance with minimum constitutional standards developed with the assistance of mental health experts (the "*Wyatt*" standards). *Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd in relevant part*, 503 F.2d 1305 (5th Cir. 1974) (standards for mentally ill); *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D.

Ala. 1972), *aff'd in relevant part*, 503 F.2d 1305 (5th Cir. 1974) (standards for developmentally disabled).

But as the federal district court would write 26 years after *Wyatt* was filed, "the establishment of the *Wyatt* standards proved to be only the first step in an extended struggle to secure the rights of mentally ill and mentally retarded residents of Alabama's institutions." *Wyatt v. Rogers*, 985 F. Supp. at 1362. In 1981, plaintiffs were forced to return to court regarding Alabama's noncompliance with the court's 1975 orders. Alabama's response was to ask the court to dissolve the *Wyatt* standards. *Id.* at 1363 (describing 1981 litigation).

In 1986, Alabama entered into a consent decree which embodied the *Wyatt* standards. *See Wyatt v. Wallis*, 1986 U.S. Dist. LEXIS 20052 (M.D. Ala. September 22, 1986). In 1991, however, Alabama moved to vacate the consent decree and sought abrogation of the *Wyatt* standards embodied in the decree. *Wyatt v. King*, 811 F. 1533, 1543-44 (M.D. Ala. 1993). That same year, intervenors sued about Alabama's failure to release patients who no longer met commitment criteria.[24] *See id.* at 1370. The court refused to be complicit with "Alabama's unexcused failure for over 20 years to comply with [*Wyatt*'s] Standards" and did not vacate the decree. *Id.*

Ongoing violations of the consent decree led plaintiffs to file a motion to enforce in 1993. In their motion, plaintiffs presented evidence of outrageous

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[24] At the time, Alabama was one of only two states that allowed for indefinite institutionalization. *Wyatt v. King*, 773 F. Supp. 1508, 1516 (M.D. Ala. 1991).

conduct toward children at Eufaula. *Wyatt v. Rogers*, 985 F. Supp. at 1370. Eufaula, described by the court as a "penal facility" rather than the treatment center originally envisioned, was operated "in conscious violation of the consent decree." *Id.* at 1370-71.

While Alabama moved to vacate the consent decree, the evidence showed that children were physically restrained in hammerlocks, their thumbs were bent backwards as a restraint, forearms were placed against children's necks as they stood against walls, and knees to the back were used to pin them to the ground. *Id.* at 1377. Children were also placed in seclusion "[which] resembled solitary confinement in a prison more than therapeutic exclusion in a psychiatric facility." *Id.* at 1378. This ended only after federal litigation began. *Id.*

In its December 1997 order denying in part Alabama's motion to dissolve the consent decree and terminate *Wyatt*, the court documented dozens of ongoing violations of the consent decree besides beatings in the state's facilities for adults. *Wyatt v. Rogers*, 985 F. Supp. at 1392-99. The court specifically noted that Alabama had, by signing the consent decree, committed itself to meeting the *Wyatt* standards and had not done so. *Id.* at 1415. From 1986 until 1992, in fact, Alabama "did nothing" to provide community-based alternatives to institutionalization, and it did not show any initiative in this regard until it filed its motion to dissolve the consent decree based on its alleged compliance. *Id.* at 1416.

The court further found that while the State of Alabama was attempting to dissolve the consent decree, Alabama's investigation of physical abuse of patients consisted of "coverup and denials," "condemn[ing] the

messenger of the deficiencies rather than address[ing] the problem itself." *Wyatt v. Rogers*, 985 F. Supp. at 1399. The court found that without public scrutiny and judicial oversight, Alabama would do nothing. *Id.* at 1375. This attitude, of course, is the Alabama Punting Syndrome at its apogee.

CONCLUSION

In reading this brief, Alabama will no doubt cry "sensationalism" – as it has before when confronted with the ugly evidence of its own malfeasance. *See Wyatt v. Rogers*, 985 F. Supp. at 1373 n.50, 1374. But make no mistake. This is Alabama without the ADA and without federal oversight – a state's rights Paradise indeed, but falling short of bliss for many of its citizens.

Amici join the Fifth Circuit's Judge Rives today in an observation he made 35 years ago about state-sponsored discrimination:

> I look forward to the day when the State and its political subdivisions again take up their mantle of responsibility, treating all of their citizens equally, and thereby relieve the federal government of the necessity of intervening in their affairs. Until that day arrives, the responsibility for this intervention must rest with those who through their ineptitude and public disservice have forced it.

Dent v. Duncan, 360 F.2d 333, 337-38 (5th Cir. 1966).

That day Judge Rives longed for in 1966 is not yet upon Alabama, which urges this Court to allow it to continue to opt out of the business of guaranteeing citizens'

rights in the name of states' rights. The Alabama Punting Syndrome has done its leaders no credit, but it is unlikely to disappear with any semblance of deliberate speed.

Wyatt is not a relic, yet Alabama blinks the truth about conditions that have been the subject of litigation even in the past few years. It tells this Court that it protects its citizens by "policies" and rules that in fact yank back any rights they purportedly confer. Alabama tells this Court that it is worthy of this Court's faith that it does not experiment on its citizens' rights. It tells this Court that it is worthy of the dignity of a sovereign when it has not acted like one. This Court should know that Alabama's protestations are pretense.

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Supreme Court of the United States

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA AND THE ALABAMA DEPARTMENT OF YOUTH SERVICES,
Petitioners,

v.

PATRICIA GARRETT AND MILTON ASH,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

(Additional *Amici* Listed on Inside Cover)

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Amici Curiae Joining This Brief

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AARP

ADAPT

The American Council of the Blind

The American Foundation for the Blind

The American Network of Community Options and Resources

The Arthritis Foundation

Easter Seals, Inc.

The Epilepsy Foundation

The Learning Disabilities Association of America

The National Association of the Deaf

The National Association of People with AIDS

The National Association for Rights Protection and Advocacy

The National Council on Independent Living

The National Mental Health Consumers' Self-Help Clearinghouse

The National Multiple Sclerosis Society

The National Organization on Disability

The National Parent Network on Disabilities

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IN THE
Supreme Court of the United States

No. 99-1240

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA AND THE ALABAMA DEPARTMENT OF YOUTH SERVICES,
Petitioners,

v.

PATRICIA GARRETT AND MILTON ASH,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE* [1]

This brief is filed on behalf of the American Association of People with Disabilities, AARP, ADAPT, the American Council of the Blind, the American Foundation for the Blind, the American Network of Community Options and Resources, the Arthritis Foundation, Easter Seals, Inc., the Epilepsy Foundation, the Learning Disabilities Association of America, the National Association of the Deaf, the National Association of People with AIDS, the National Association

[1] No counsel for any party had any role in authoring this brief, and no persons other than the *amici curiae* and their counsel made any monetary contribution to its preparation or submission. Written consents from the parties to the filing of this brief are on file with the Clerk of the Court.

for Rights Protection and Advocacy, the National Council on Independent Living, the National Mental Health Consumers' Self-Help Clearinghouse, the National Multiple Sclerosis Society, the National Organization on Disability, the National Parent Network on Disabilities, the National Senior Citizens Law Center, the Polio Society, and Volunteers of America, Inc. These organizations, the interests of which are described in more detail in the Appendix to this brief, have worked for years on behalf of persons with disabilities and have brought, supported, or participated in numerous lawsuits on behalf of such persons. They all have a strong institutional interest in the constitutionality of the Americans with Disabilities Act as applied to the States and in vindicating the principles of equality embodied in that Act.

INTRODUCTION AND SUMMARY OF ARGUMENT

This brief focuses on one significant aspect of Petitioners' claim that the Americans with Disabilities Act ("ADA" or "the Act") cannot be sustained under Section 5 of the Fourteenth Amendment—the claim that the central provisions of the ADA go far beyond prohibiting conduct that, when engaged in by a State actor, violates the Equal Protection Clause of the Fourteenth Amendment. We understand that the Brief for Respondents and several of the *amicus* briefs supporting Respondents will argue that, to the extent that the ADA goes beyond the prohibitions of the Fourteenth Amendment, it does so in a manner that satisfies the "congruence and proportionality" test of *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), and *Kimel v. Florida Board of Regents*, 120 S. Ct. 631, 644-45 (2000). While the *amicus* organizations signing this brief strongly support those arguments, this brief takes issue with the widespread assertion that the prohibitions of the ADA greatly exceed the prohibitions of the Equal Protection Clause.

The circuit court decisions that have struck down the ADA as applied to the States have in large part relied upon the proposition that the prohibitions of the ADA go far beyond

the prohibitions of the Equal Protection Clause. Taking into account this Court's prior holding that persons with disabilities do not form a "suspect class," *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439-42 (1985), one of the notable decisions below states flatly that "the ADA 'prohibits very little conduct likely to be held unconstitutional,'" and "*no one* believes that the Equal Protection Clause establishes the disparate-impact and mandatory-accommodation rules found in the ADA." *Erickson v. Board of Governors*, 207 F.3d 945, 949 & 951) (7th Cir. 2000), *petition for cert. filed sub nom. United States v. Board of Governors*, 69 U.S.L.W. 3003 (U.S. June 26, 2000). This view is echoed in the Brief for Petitioners: "[I]t is the rare classification based on disability that would rise to the level of a constitutional violation" (Pet. Br. at 28), and "the two mandates are worlds apart in their substantive rules" (*id.* at 30). It is also echoed in the Brief of *Amici Curiae* States in Support of Petitioners: "[T]he ADA '* * * prohibits substantially more State . . . decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard.'" *Id.* at 15 (quoting *Kimel*, 120 S. Ct. at 647).

The premises behind these propositions are two-fold: first, an unduly narrow position on the meaning of the Equal Protection Clause as applied to "non-suspect" classifications and, second, a position on the meaning or application of the prohibitions of the ADA that ignores some important limitations in that Act.

The notion that the prohibitions of the ADA go far beyond the prohibitions of the Equal Protection Clause appears to be rooted in *Washington v. Davis*, 426 U.S. 229 (1976), and *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979). Both are conventionally cited for the proposition that, to show a violation of the Equal Protection Clause, "it is insufficient to show that a neutral classification has a disparate impact, instead it is necessary to show intentional discrimination."

Brief of the *Amici Curiae* States in Support of Petitioners at 15. See also *Erickson*, 207 F.3d at 950: "When a state law or practice does not expressly concern a particular characteristic (such as race, sex, age, or disability), but has a disparate impact on persons with that characteristic, the plaintiff in constitutional litigation must establish that the state *intends* to discriminate on the basis of that characteristic," citing *Feeney* and *Washington v. Davis*.

In fact, as we show in Part I, neither *Washington v. Davis* nor *Feeney* is particularly instructive in assessing the comparative scopes of the ADA and the Equal Protection Clause. In relying on these cases to assert that a plaintiff in an Equal Protection Clause case must show "intentional discrimination," Petitioners and their *amici* ignore the more fundamental requirement that the state action in question be rationally related to a legitimate state purpose. This point was made unmistakably clear in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), in a case involving the discriminatory denial of a zoning permit for a home for persons with mental disabilities. Neither *Washington v. Davis* nor *Feeney* are inconsistent with the proposition that statutes with a substantially disproportionate adverse impact on persons such as those with disabilities must be rationally related to a legitimate state purpose, because in each case the Court found that state action in question amply related to a "legitimate" or even "worthy" purpose. Other cases, such as *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), and *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), demonstrate that "deliberate indifference," as well as intentional discrimination, may violate the Equal Protection Clause.

We then show in Part II that the prohibitions of the ADA, including those often labeled "disparate impact provisions," are closely related to the prohibitions of the Equal Protection Clause. The relationship is so close that cases under the ADA will typically have been provable under the Equal Protection

Clause as well. In short, the extent to which the prohibitions of the ADA go beyond the prohibitions of the Equal Protection clause has been greatly overstated by the Petitioners, their *amici*, and the decisions that have held the ADA unconstitutional as applied to the States.

ARGUMENT

I. The Equal Protection Clause Proscribes Not Just Governmental Actions Intended To Disadvantage the Disabled Invidiously, But Also Governmental Actions Which Disadvantage the Disabled in Ways Not Rationally Related to a Legitimate Governmental Purpose or Which Reflect Deliberate or Selective Indifference to Discrimination Against Persons with Disabilities.

As we have explained, Petitioners' argument and the circuit court decisions holding the ADA unconstitutional as applied to the States rest largely on the proposition that, under *Washington v. Davis*, 426 U.S. 229 (1976), and *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), only "intentional" or "purposeful" discrimination—and not "disparate impact" or denial of "reasonable accommodation"—violate the Equal Protection Clause. These cases, however, have a more limited significance and are consistent with the rule that governmental actions with a substantially adverse impact upon the disabled violate the Equal Protection Clause where they are not rationally related to a legitimate governmental purpose.

Washington v. Davis concerned a test for police recruits, designed to test "verbal ability, vocabulary, reading and comprehension," that plaintiffs, relying on *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), had attacked solely on the ground that the test predominantly failed black recruits and "'bore no relationship to job performance.'" 426 U.S. at 235. This Court ruled that such proof did not make out an Equal Protection Clause violation, rejecting as unworkable "[a] rule

that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another." *Id.* at 248. The test in *Washington v. Davis*, however, served not merely "neutral ends" but clearly "legitimate" ends, as the Court's opinion shows. Indeed, affirming the district court's finding that the test was "reasonably and directly related to the requirements of the police recruit training program," *id.* at 235, the Court ruled in Part III of its opinion that the test met the job-relatedness and business necessity requirement of *Griggs*. *Id.* at 248-52. The Court found it manifestly reasonable for a government to seek "modestly to upgrade the communicative abilities of its employees rather than to be satisfied with some lower level of competence, particularly where the job requires special ability to communicate orally and in writing." *Id.* at 246. It is not surprising that a performance test that met the statutory requirement of Title VII under *Griggs* also met the constitutional standard.

Accordingly, while *Washington v. Davis* stands for the proposition that a "disproportionate impact" (racial or otherwise) is not sufficient to make out a constitutional violation, and that "the invidious quality of a law claimed to be * * * discriminatory must ultimately be traced to a * * * discriminatory purpose," 426 U.S. at 240, it does not rule out different ways of establishing the Equal Protection violation. It specifically acknowledges that the necessary "invidious discriminatory purpose" may often be "inferred from the totality of the relevant facts, including the fact * * * that the law bears more heavily on one race than another." *Id.* at 242. *Washington v. Davis* is thus consistent with finding even a neutral law or other governmental action invalid because the circumstances—including the absence of an adequate, legitimate purpose—point to the necessary "discriminatory purpose" or its functional equivalent.

Personnel Administrator v. Feeney is similarly limited because of the presence there of a legitimate governmental

purpose. *Feeney* reiterated the basic holding of *Washington v. Davis*, in the context of a facially neutral state law with a disproportionate impact on women (a law giving veterans preference in state employment), but added several clarifications. The Court noted that even a facially neutral statute may be "gender-based" and thus presumptively unconstitutional. 442 U.S. at 274. But even if the statute is not gender-based, it may "reflect[] invidious gender-based discrimination." *Id.* In finding the Massachusetts law not "gender-based," the Court relied heavily on the fact that the law excluded a significant number of men as well as women. *Id.* at 275. This implies that the degree of "fit" between classification and objective is significant in evaluating even an ostensibly neutral law.[2] And in finding that the neutral Massachusetts law had not been shaped by a "discriminatory purpose," the Court relied on the district court's conclusion—not disputed on appeal—that the "legislative choice" of favoring veterans in employment was "legitimate." *Id.* at 277. Indeed, the Court referred to that choice as "worthy." *Id.* at 278.

It was in this context that the Court in *Feeney* stated that "discriminatory purpose," for Equal Protection Clause purposes, "implies that the decisionmaker * * * selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 279. Whatever explanatory power the words "because of" may have had in *Feeney* and may have in certain cases, they are not exhaustive as a

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[2] See also *Romer v. Evans*, 517 U.S. 620, 632 (1996) ("[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority.").

general articulation of the Equal Protection standard, because in *Feeney*, just as in *Washington v. Davis*, the Court did not face governmental action not rationally related to a legitimate governmental purpose.

New York City Transit Authority v. Beazer, 440 U.S. 568 (1979), is another case that demonstrates the significance of finding a legitimate governmental purpose. There, the Court began its inquiry with distinguishing between "[g]eneral rules that apply evenhandedly"—which are valid under the Equal Protection Clause—and rules that have "a special impact on less than all the persons subject to its jurisdiction"—in which case "the question whether [the equal protection] principle is violated arise[s]." *Id.* at 587-88. This language strongly suggests that, when the law does not apply "evenhandedly," either because it discriminates on its face or because of its different impact on different groups, then the Equal Protection Clause requires a justification, and, at the very least, that justification must have a rational relationship to a legitimate state purpose. While the city's denial of employment to methadone users in *Beazer* could have been deemed "because-of" discrimination, the Court found that the law did not "create or reflect any special likelihood of bias on the part of the ruling majority" and was not "drawn 'with an evil eye and an unequal hand'" or "motivated by 'a feeling of antipathy against a specific group of residents.'" *Id.* at 593 & n.40 (citations omitted). Instead, the law was motivated by an interest in operating "a safe and efficient transportation system," *id.* at 593 n.40, obviously a legitimate and neutral public purpose of substantial weight, and the means chosen were rationally related to achieving this goal.

There is other evidence of this Court's realization that *Washington v. Davis*, in spite of its language, cannot be read as standing for the proposition that a law or governmental action with a disproportionately adverse impact upon some group will fail the test of the Equal Protection Clause only

upon proof that of some specific intent to injure the disadvantaged group. While *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), is a case under Title VII of the Civil Rights Act of 1964 and not under the Equal Protection Clause, it is striking that the opinion for the Court states: "The distinguishing features of the factual issues that typically dominate in disparate impact cases do not imply that the ultimate legal issue is different than in cases where disparate treatment analysis is used." 487 U.S. at 987 (citing Justice Stevens's concurrence in *Washington v. Davis*). As the opinion explains, "some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." *Id.* And as the opinion later explains further, one advantage of disparate impact analysis is that it gets at "the problem of subconscious stereotypes and prejudices," which may not be "adequately policed" by disparate treatment analysis and a requirement of providing "discriminatory intent." *Id.* at 990.[3] Because the proof of disparate treatment in a Title VII case is essentially the proof needed to prove an Equal Protection Clause violation, this language is instructive for the relevance of disparate impact analysis to Equal Protection Clause violations.

M.L.B. v. S.L.J., 519 U.S. 102 (1996), also indicates the Court's appreciation of the limitations of conventional resorts to *Washington v. Davis*. In striking down a state statute that required that a parent seeking to appeal the termination of her parental rights pay a court fee, the Court rejected the State's reliance upon *Washington v. Davis* for the proposition that a neutral law serving ends within the power of government may not be struck down under the Equal Protection Clause simply because of its disparate impact upon a suspect or, as here, a

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[3] The quoted passages are from Parts II-A and II-B of the opinion written by Justice O'Connor. While that opinion is in part a plurality opinion, Parts I, II-A, II-B, and III constituted the opinion of the Court.

non-suspect class. The Court replied: "*Washington v. Davis* * * * does not have the sweeping effect respondents attribute to it." *Id.* at 126. The statute at issue was not merely "disproportionate" in effect, but "wholly contingent on one's ability to pay." *Id.* Statutes of this kind "'visi[t] different consequences on two categories of persons,' [quoting *Williams v. Illinois*, 399 U.S. 235, 242 (1970)]; they apply to all [members of the specified class] and do not reach anyone outside that class." 519 U.S. at 127. While one can read *M.L.B.* as limited by its context to governmental actions that "'wor[k] a unique kind of deprivation,'" *id.*, quoting *Lassiter v. Department of Social Services of Durham County*, 452 U.S. 18, 27 (1981), the discussion of *Washington* was not so limited and suggests strongly that the nature of the statute or governmental action at issue—including the "fit" between the disadvantaged class and a class of persons historically disadvantaged in society—is relevant to determining whether or not proof of "invidious discriminatory purpose" as that term is conventionally understood will be required. In addition, the Court found that the added expense to the State would not be an "undue burden," 519 U.S. at 122, showing that added expense alone may be an insufficient justification for a law with unequal effect.[4]

Against this background, the Court's decision in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), takes on additional clarity. That case may be regarded as one of disparate treatment, because the zoning ordinance required a special use permit for homes for the mentally retarded (as well as several other groups), and

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[4] The dissenters in *M.L.B. v. S.L.J.*, relying on *Washington v. Davis* and *Feeney*, took pains to point out that "[a] disparate impact, even upon members of a racial minority, the classification of which we have been most suspect, does not violate equal protection." 519 U.S. at 135. Nothing in this brief takes issue with that point. We do not contend that a disproportionate impact alone suffices for an Equal Protection Clause violation.

because the focus of the Court's attention was on the specific city council action of denying one particular proposed home the necessary permit. Nevertheless, the city council put forth several entirely neutral reasons for denying the permit—such as the home's location on a five-hundred year flood plain, concerns about the size of the home and number of occupants, and concerns about congestion—and several reasons that, however questionable in relying on community attitudes about the mentally retarded, were not, so far as the Court's opinion shows, motivated by invidious feelings or antipathy towards the mentally retarded. Applying the standard that the governmental action must be "rationally related to a legitimate governmental purpose," the Court found some proffered reasons illegitimate—such as the alleged concern about negative attitudes of nearby property owners—because "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases" for denying a permit that other types of housing do not require, *id.* at 448, and others irrational—such as the alleged concern about the flood plain, size of home, number of occupants, and congestion, *id.* at 449-50. And the Court did not conclude that the case had to be remanded for findings of fact on whether the council had been motivated by animus, invidious intent, or ill will. Instead, the Court adjudged that the council action "appears to us to rest on an irrational prejudice against the mentally retarded." *Id.* at 450. Such action cannot be "rationally related to a legitimate state interest."

By contrast, this Court in *Heller v. Doe*, 509 U.S. 312 (1993), found several legitimate rationales for the state law that imposed a higher burden of proof for the commitment of the mentally ill than it did for the commitment of the mentally retarded, in particular, "differences in the ease of diagnosis and the accuracy of the prediction of future dangerousness and * * * the nature of the treatment received after commitment." *Id.* at 328. Thus, the Court found that the state

law did not create a classification with no rational connection to a legitimate state interest. Moreover, the justifications given in *Heller* for upholding a legislative classification "'if there is any reasonably conceivable state of facts that could provide a rational basis for the classification,'" *id.* at 320, quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993), do not apply to governmental action at the level at which most employment decisions are made. The Court said: "'[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.'" 509 U.S. at 320, again quoting *FCC v. Beach Communications, Inc.*, 508 U.S. at 315. The employment decisions made by State agencies, however, are typically not "legislative choices" but decisions by supervisors or others with delegated powers, as in the two cases now before the Court. Such decisions are fully "subject to courtroom factfinding." While there may be circumstances in which those decisions are based on "rational speculation," more typically they are based on an assessment of the facts available to them or, in an unfortunate number of cases, on irrational beliefs and fears about the disabled, simple hostility, or utter disregard for the possibility that the disabled person can do the job—all of which may be determined through regular discovery.

We have already shown that this Court has acknowledged that a law with disproportionate impact upon certain classes of persons may be "functionally equivalent" to a law that expressly classifies on the basis of membership in the class, using the words of *Watson v. Fort Worth Bank & Trust*, *supra*, 487 U.S. at 987. This insight is particularly applicable to laws that disproportionately impact persons with disabilities, because those laws or regulations are often drafted in terms of the particular physical ability at issue (such as eyesight requirements, lifting requirements, agility requirements, and so forth), and because other facially "neutral" practices, such as constructing a building or space

within a building in such a way that persons in wheelchairs cannot have access, will exclude one class of persons with disability (those who must use wheelchairs) and virtually no others. See *M.L.B. v. S.L.J.*, *supra*.[5]

Moreover, a law or governmental action may "rest on an irrational prejudice" when the government's failure to modify facially neutral requirements to take account of qualified persons with a disability rests on deliberate or selective indifference to the interests and capabilities of such persons. In *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 290 (1998), this Court held that "deliberate indifference to discrimination" can constitute the kind of "intentional discrimination" that is necessary for imposing monetary liability under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* Title IX, like Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, upon which Title IX was modeled, provides remedies for discrimination on the basis of the specified characteristic (sex for Title IX, race for Title VI) that violates the Equal Protection Clause. See *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 589-90 (1983). Thus a school board could be liable for a teacher's unlawful sexual harassment of a pupil, even when the school board intended no such violation,

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[5] Our conclusion here is consistent with the Court's discussion of the Equal Protection Clause in *Kimel v. Florida Board of Regents*, 120 S. Ct. 630, 646 (2000). While the Court stated that "a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests," referring to such a classification as "presumptively rational," it also reiterated that "States may discriminate on the basis of age without offending the Fourteenth Amendment *if* the age classification in question is rationally related to a legitimate state interest." *Id.* (emphasis added). Moreover, disabilities, which come in an almost infinite number of varieties and degrees, often affect only one capacity, and thus are significantly less likely to serve as a rational proxy for a collection of "qualities, abilities, or characteristics" relevant to a State's legitimate interests, even if a particular disability appropriately disqualifies an individual from a particular job.

if the school board had the requisite notice or knowledge and did little or nothing in response. The *Gebser* holding was reiterated and explained in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 641-43 (1999), in the context of school board liability for pupil-on-pupil sexual harassment: "*Gebser* thus established that a recipient intentionally violates Title IX, * * * where the recipient is deliberately indifferent to known acts of teacher-student discrimination." (The Court did not find it necessary to discuss *Washington v. Davis* or *Feeney* in either *Gebser* or *Davis*.)

Discrimination against persons with disabilities has historically been based on prejudice, irrational fear, and simple distaste, as well as ignorance and disregard, as the other *amicus* briefs in this proceeding amply demonstrate. Any of these factors may lead a decisionmaker to discriminate against persons with disabilities in making employment decisions when there is no rational reason whatsoever to do so, either expressly or by deliberate or unconscious indifference to the possibility that the individual may be as well or better qualified than another person to perform what the employer determines to be the fundamental aspects of the job. Such discrimination severely handicaps qualified disabled individuals in pursuing the employment opportunities open to other citizens, and thus severely limits their ability to participate fully in the country's economy. In short, this discrimination restricts those with disabilities in their ability to participate fully in the nation's social and political life.

The equal opportunity to become a self-supporting member of society is a fundamental right of citizenship under the Equal Protection Clause. That Clause speaks directly to that concern in demanding that a State, when acting as an employer, be evenhanded in its treatment of all of its citizens. And as the *Cleburne* case demonstrates, the protection that the Equal Protection Clause extends to persons with disabilities is substantial.

We now turn to the specific provisions of the ADA to show their close connection to the prohibitions of the Equal Protection Clause.

II. The Prohibitions of the ADA, Insofar As They Apply to the States, Are Closely Connected to the Prohibitions of the Equal Protection Clause.

In discussing the specific provisions of the ADA, we concentrate on the provisions of Title I, the employment title. We do so for several reasons. The complaints of Ms. Garrett and Mr. Ash both set forth claims of discrimination in employment, and the prohibitions of the Act as applied to employment are specifically set forth in Title I, not Title II. Moreover, Petitioners and the circuit courts that have ruled against the constitutionality of the ADA as applied to the States have concentrated their fire on the ADA's requirement of reasonable accommodation, which is specifically set forth in Title I in 42 U.S.C. § 12112(b)(5), and on what they term the ADA's prohibition of "disparate impact," with explicit or implicit references to two other provisions of Title I, § 12112(b)(3)(A) and to § 12112(b)(6). *E.g.*, Pet. Br. at 19, 29, 42-43; *Erickson*, 207 F.3d at 951. In addition, the circuit courts are divided on whether any employment action may be brought under Title II of the ADA, and the Court has not granted certiorari on that issue.[6] Finally, the Department of Justice regulations on Title II make the requirements of Title I applicable to actions for discrimination in employment based

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[6] Compare *Zimmerman v. Oregon Dep't of Justice*, 170 F.3d 1169 (9th Cir. 1999) (holding that Congress unambiguously established Title I as the only title of the ADA relating to employment discrimination), *petition for cert. filed*, 68 U.S.L.W. 3129 (U.S. Aug. 10, 1999) (No. 99-243), with *Bledsoe v. Palm Beach County Soil & Water Conservation Dist.*, 133 F.3d 816, 822 (11th Cir. 1998) ("'the language of Title II's antidiscrimination provision * * * is a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context, . . .' Accordingly, employment coverage is clear from the language and structure of Title II." (citation omitted)).

on Title II, if the public entity "is also subject to the jurisdiction of title I," as is the case here. 28 C.F.R. § 35.140(b)(1). Thus, the only question clearly presented at this time is whether Congress exceeded its powers under the Fourteenth Amendment in passing Title I of the ADA.[7]

A. The ADA Expressly Prohibits Intentional or Invidious Discrimination That Would Violate the Equal Protection Clause.

The heart of Title I is the general rule that no covered entity shall "discriminate against a qualified individual with a disability because of the disability of such individual" in regard to employment. 42 U.S.C. § 12112(a). The meaning of the term "discriminate" is then further specified in the seven paragraphs of § 12112(b).

The general rule, by itself, manifestly prohibits the kind of discrimination that would be prohibited by the Equal Protection Clause. It encompasses "intentional discrimination," "purposeful discrimination," "invidious discrimination" and all of the other locutions that the Court has used in its attempts to capture the essence of an Equal Protection Clause violation. Concern about such discrimination, whether by State entities or by private entities, was one of the major themes that led to the ADA. Congress found that individuals with disabilities "continually encounter * * * outright

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[7] Much of what is said in this brief would be applicable to defending the constitutionality of Title II of the ADA as applied to the States in non-employment contexts. We consider it highly unlikely, however, that this Court will directly address the constitutionality of Title II in this case. The meaning of the general rule against discrimination by public entities in Title II is elaborated not in specific statutory provisions, as in Title I, but in regulations of the Department of Justice issued under Congressional direction pursuant to 42 U.S.C. § 12134. See 28 C.F.R. part 35. That difference, coupled with the many different contexts in which Title II may be applicable and Congress's enactment of a severability provision, 42 U.S.C. § 12213, counsels against reaching out to decide questions not presented by this case.

intentional exclusion, * * * exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities." § 12101(a)(5). Accordingly, § 12112(a) clearly was intended to prohibit and, by its very terms, does prohibit deliberate, purposeful exclusion based on irrational fear or prejudice.

That general rule of § 12112(a) is also broad enough to cover discrimination based on the kind of deliberate indifference to the needs of qualified persons with disabilities that would constitute a violation of the Equal Protection Clause. *See, e.g., Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1153 (10th Cir. 1999) ("intentional discrimination can be inferred from a defendant's deliberate indifference to the strong likelihood that pursuit of its questioned policies will likely result in a violation of federally protected rights").[8]

In this connection, we note that Ms. Garrett's complaint specifically alleges that the University of Alabama "intentionally, maliciously and with reckless indifference discriminated against [her] because of her disability * * *." Garrett Amended Complaint ¶ 18, J.A. 40-41. Depending on the evidence at trial, her case could well demonstrate the kind of invidious discrimination against a disabled person, regardless of job performance, that could be pursued under the Equal Protection Clause. While Mr. Ash's complaint is not as explicit in alleging invidious discrimination, his complaint alleges, in part, failure by the Alabama Department of Youth Services to enforce its own no-smoking policy, despite being aware of the severe impact on Mr. Ash because of his respiratory disability. Ash Complaint ¶ 8, J.A. 8. Mr.

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[8] With respect to the parallel provision in Title II of the ADA, § 12132, Justice Kennedy, concurring in the judgment in *Olmsted v. L.C.*, 119 S. Ct. 2176, 2192 (1999), remarked: "Underlying much discrimination law is the notion that animus can lead to false and unjustified stereotypes, and vice versa."

Ash's allegation is broad enough to encompass proof that the Department (or the responsible supervisor) was deliberately indifferent to his plight or even hostile to people in his predicament. While Petitioners assert (at 29) that "a motion to dismiss an equal protection claim [in *Garrett* and *Ash*] would be compelled," they do so by ignoring the allegations of the complaints mentioned above.[9]

Finally, the general rule of § 12112(a) is broad enough to cover exclusions of persons with disabilities or classifications with an adverse impact on such persons when those exclusions or classifications simply have no rational relationship to a legitimate state purpose, taking into account the impact of the exclusion or classification—actions that, when taken by the State, would violate the Equal Protection Clause, as shown by *Cleburne*, and *M.L.B. v. S.L.J.*, discussed above, and other rational basis cases. See, *e.g.*, *Plyler v. Doe*, 457 U.S. 202, 224 (1982) (denial of public education to undocumented alien children violated the Equal Protection Clause; such a denial "can hardly be considered rational unless it furthers some substantial goal of the State"). See also *Turner v. Safley*, 482 U.S. 78, 89-90, 98-99 (1987) (prison regulation prohibiting most inmate marriages failed to satisfy the test of a "valid, rational connection" to a "legitimate and neutral" governmental objective).[10]

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[9] See *Village of Willowbrook v. Olech*, 120 S. Ct. 1073, 1074 (2000) (affirming the reversal of an order dismissing a complaint under the Equal Protection Clause and stating, "Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.").

[10] These cases are more analogous to the types of cases that would be brought under Title II of the ADA, rather than Title I, but the underlying principle is the same.

B. The ADA Requirement of Reasonable Accommodation Is Closely Connected to the Requirements of the Equal Protection Clause.

Petitioners appear to consider it obvious that the ADA goes far beyond the requirements of the Equal Protection Clause in requiring a covered entity to make a "reasonable accommodation" unless the accommodation would impose an "undue hardship on the operation of the business" of the covered entity. § 12112(b)(5)(A). Pet. Br. at 42-43. In fact, the "reasonable accommodation" is reasonably well-tailored to the requirements of the Equal Protection Clause with respect to persons with disability.

As an initial matter, the requirement of "reasonable accommodation" comes into play only if the plaintiff meets the threshold requirements of being a "qualified individual" with "a disability." Establishing that one is an individual with a "disability"—a term defined in § 12102(2)—is a significant hurdle for an ADA plaintiff, as the Court's recent decisions show. *Murphy v. United Parcel Service, Inc.*, 119 S. Ct. 2133 (1999); *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139 (1999); *Albertsons, Inc. v. Kirkingburg*, 119 S. Ct. 2162 (1999).[11] A plaintiff must then establish that he or she is a "qualified" individual with a disability within the meaning of § 12111(8), meaning "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." This requirement is also a highly significant limitation on the employer's obligation under the ADA, as shown by the Interpretative Guidance on Title I,

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[11] Section 12102(2) defines "disability" to mean:

> "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> "(B) a record of such an impairment; or
>
> "(C) being regarded as having such an impairment."

issued by the Equal Employment Opportunity Commission ("EEOC"), which, among other things, states that "the inquiry into essential functions is not intended to second guess an employer's business judgment with regard to production standards, whether qualitative or quantitative, nor to require employers to lower such standards." 29 C.F.R. § 1630 App., Guidance on § 1630.2(n), last ¶. If the individual cannot perform an essential function of the job under the statutory standard, even with a reasonable accommodation, then the employer is, under the ADA, free to decline to hire the individual on that ground, free to fire the employee who becomes thus disabled, and free to decline to transfer or decline to promote the employee who is or becomes thus disabled with respect to the desired position.

Finally, while Petitioners seem to suggest that employers will rarely be able to establish that a requested accommodation is "unreasonable" or that even an otherwise reasonable accommodation would impose on "undue hardship," the statutory language does not compel such a result. The term "undue hardship" is defined as an "action requiring significant difficulty or expense, when considered in light of" factors that include:

> "(i) the nature and cost of the accommodation * * *;
>
> "(ii) the overall financial resources of the facility * * *; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
>
> "(iii) the overall financial resources of the covered entity; the overall size the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
>
> "(iv) the type of operation or operations of the covered entity, including the composition, structure, and

functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity." § 12111(10)(A) and (B).

Petitioners do not argue that some important factor has been left out of this list of factors, and it would be difficult to argue that the list does not give employers wide room to argue that a particular accommodation imposes an undue hardship.[12]

In any event, in many cases an employer's refusal to make an accommodation will be based on the kind of ignorance, hostility, prejudice that would be actionable in any event under the general rule of § 12112(a) and the Equal Protection Clause. As noted above, that may be the case for Ms. Garrett and Mr. Ash. In other cases, the employer may be refusing to make an accommodation for a qualified individual with a disability when it has, on many occasions, made accommodations of equivalent nature or cost for individuals without disabilities—conduct that may, on appropriate proof, be actionable under the Equal Protection Clause. In still other cases, the employer may have facially neutral reasons for denying an accommodation, but those reasons may have been adopted with a unlawfully discriminatory purpose, may not be applied even-handedly, and may not be rationally related to the legitimate conduct of its business or activities. See, *e.g.*, *M.L.B. v. S.L.J.*, *supra*, where the Court, in finding a violation of the Equal Protection Clause in a court fee, found that the added expense to the State would not be an "undue burden," 519 U.S. at 122, showing that added expense alone

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[12] We do not discuss whether, to the extent that it has done so, Congress may constitutionally shift the burden of persuasion on some of these issues from plaintiff to defendant, because such a rule of trial procedure seems well within the limits imposed by the congruence and proportionality test addressed in other briefs.

may be an insufficient justification under the Equal Protection Clause for a law with unequal effect.[13]

Thus, the argument of Petitioners and the courts that have ruled against the constitutionality of the ADA rests on supposed cases where the denial of a request for a reasonable accommodation by a qualified individual cannot be based on "undue hardship" but would nevertheless be rationally related to the legitimate conduct of the employer's business and not the product of indifference, negative stereotypes, fear, and other grounds that would fail the test of *Cleburne* and other cases. We do not deny that such cases may come up, but there is little reason on this record for concluding that those cases will dominate litigation or compliance under § 12112(b)(5), and there would be no justification for holding Title I of the ADA invalid as applied to actions against the States when such a case is not before the Court. Indeed, none of the specific examples of alleged ADA excesses in the Brief of the *Amici Curiae* States in Support of Petitioners (at 18-27) involves § 12112(b)(5).

In *Erickson v. Board of Governors*, 207 F.3d 945 (7th Cir. 2000) (Easterbrook, J.), the court attempted to recite a clear example of ADA excess, stating:

> "[I]t is rational for a university to favor someone with good vision over someone who requires the assistance of

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[13] See also *Turner v. Safley*, 482 U.S. 78, 90-91 (1987), where, in applying a rational basis test essentially equivalent to the test of the Equal Protection Clause, the Court remarked: "By the same token, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns. * * * [I]f an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at de minimis cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." While made in a different context, these words have obvious relevance to accommodations sought in the employment context, as well as to accommodations sought in institutional and other contexts covered by Title II of the ADA.

> a reader. The sighted person can master more of the academic literature (reading is much faster than listening), improving his chance to be a productive scholar, and also is less expensive (because the university need not pay for the reader). An academic institution that prefers to use a given budget to hire a sighted scholar plus a graduate teaching assistant, rather than a blind scholar plus a reader, has complied with its constitutional obligation to avoid irrational action. But it has *not* complied with the ADA, which requires accommodation at any cost less than 'undue hardship'." 207 F.3d at 949.

As an initial matter, this example appears to take it as a given that faster reading produces better scholars, a matter that is least debatable because blind scholars, even if slower, may master the available material better, write more and wiser articles, be better lecturers, and so forth. Indeed, it may be irrational or simply discriminatory not to hire a blind scholar and the required reader, if the scholar is at the top of his or her field and the cost of the reader is similar to the costs of other accommodations of "special arrangements" provided to other scholars. Accepting, however, what appears to be one assumption of the hypothetical—that the sighted scholar turns out to be better qualified than the blind scholar, even if the University were to provide the blind scholar with a reader—the same circuit has indicated, in a slightly different context, that the University in the example could in fact "favor" the sighted scholar without violating the ADA:

> "Suppose that two workers are vying for a promotion to a job that requires a lot of reading. One of the workers is dyslexic, and as a result reads very slowly. He can do the job for which he is applying—and let us assume that his employer would give him the job if there were no other applicant for it—but he can't do it as well as the other applicant, who does not have a disability. It is not the dyslexic worker's 'fault' that he can't read as well as

> his competitor; it is due entirely to his disability. The employer could not refuse to consider him for the promotion because of his dyslexia, but it is not disability discrimination for the employer to give the promotion to the other worker, the one who can do the job better." *Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194, 1196 (7th Cir. 1997) (Posner, J., with Easterbrook and Wood, JJ., concurring).

If this is correct—and we do not contend that such issues have been thoroughly sorted out yet in the courts of appeals, much less in this Court—then the University in the *Erickson* example may hire or promote the sighted scholar over the blind scholar on the ground that he or she is more qualified than the blind scholar, even if the blind scholar were to be given a reader. That decision would be different from refusing to consider the blind scholar because he would need a reader that the University does not want to provide.

In any event, it is by no means clear that most universities—whose departments may operate on limited budgets and need a certain number of graduate assistants to help with teaching loads—would not satisfy the "undue hardship" test in the kind of case *Erickson* presents. Contrary to the implication of this example and the suggestion in the Brief of *Amici Curiae* States in Support of Petitioners (at 13 n.12), the ADA does not define "reasonable accommodation" to "include * * * readers or interpreters." Section 12111(9) provides that the term "may" include readers or interpreters. It is thus open to a university to argue that the ADA does not require them to hire a blind scholar who needs a reader to do the job.

In short, the animal that *Erickson* attempted to cage—the clear violation of the ADA that is not remotely a violation of the Equal Protection Clause—is more elusive than that decision and Petitioner's Brief indicate. The "reasonable accommodation" requirement of the ADA is not as far

removed from the concerns of the Equal Protection Clause as critics of the ADA have contended. It is in fact closely linked to those concerns, even if it may go beyond the requirements of Equal Protection in some cases.

C. The "Disparate Impact" Provisions of the ADA Are Closely Connected to the Requirements of the Equal Protection Clause.

Petitioners (at 29 and 42-43) characterize two provisions of Title I as "disparate impact" or "disparate-effect" provisions. The first states that the term "discriminate" as used in § 12112(a) includes "utilizing standards, criteria, or methods of administration * * * that have the effect of discrimination on the basis of disability." § 12112(b)(3)(A). The second states that the term "discriminate" also includes "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria * * * is shown to be job-related for the position in question and is consistent with business necessity." § 12112(b)(6). While the first provision, § 12112(b)(3)(A), does not by its own terms refer to job-relatedness and business necessity, § 12113(a) makes job-relatedness and business necessity a defense to a charge of discrimination under this provision (as well as the other provisions of Title I). The test of job-relatedness and business necessity was obviously drawn from the test for "disparate impact" discrimination established in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

Petitioners have not demonstrated that the public employer's burden of proving that a neutral standard that has a disproportionate impact upon the disabled is "job-related for the position in question and is consistent with business necessity," § 12111(b)(6), is far removed from the burden of defending against an Equal Protection Clause challenge. Two

years before passage of the ADA, this Court described the ultimate issue in a *Griggs* case as follows:

> "Though we have phrased the query differently in different cases, it is generally well established that at the justification stage of such a disparate-impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer." *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989), citing *Watson*, *New York City Transit Auth. v. Beazer*, and *Griggs*.

For public employers, this test is remarkably close to the Equal Protection Clause standard, "rationally related to a legitimate state interest."

It is true that Congress in the ADA, as in the Civil Rights Act of 1991, rejected the *Wards Cove* holding that the burden of persuasion in such cases always stayed with the plaintiff, shifting it instead to the employer. See 42 U.S.C. § 12113(a) (the ADA provision) and 42 U.S.C. § 2000e-2(k)(1)(A)(i) (the Title VII provision as amended by the 1991 Civil Rights Act). Congress indicated in passing the 1991 Act that it was codifying the pre-*Wards-Cove* case-law on job-relatedness and business necessity, Pub. L. 102-166, § 3(2), 105 Stat. 1071 (1991), 42 U.S.C. § 1981 note,[14] and the EEOC has indicated that Congress had the equivalent intention in passing the ADA: "The concept of 'business necessity' has the same meaning as the concept of 'business necessity' under section 504 of the Rehabilitation Act of 1973." 29 C.F.R. § 1630 App., Guidance on § 1630.10, first ¶. But the above quotation from *Wards Cove* shows that the terms "job-related" and "consistent with business necessity" were largely synonymous even under pre-*Wards-Cove* case law.

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[14] "The purposes of this Act are— * * * (2) to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in [*Griggs*], and in the other Supreme Court decisions prior to [*Wards Cove*]."

Moreover, the EEOC's Interpretative Guidelines state that the purpose of the provision is "to ensure that there is a fit between the job criteria and an applicant's (or employee's) actual ability to do the job." *Id.* See also *EEOC v. Amego*, 110 F.3d 135, 144-45 (1st Cir. 1997) ("[W]here, as here, no evidence of animus is present, courts may give reasonable deference to the employer's assessment of what the position demands. * * * [W]e think there should be special sensitivity to the danger of the court becoming a super-employment committee."). Thus, the ADA test of "job-related and consistent with business necessity" appears to be essentially the same as bearing "a manifest relationship to the employment in question." *Griggs*, 401 U.S. at 432. It will be a rare case in which a public employer cannot satisfy that test yet would clearly win an Equal Protection Clause challenge.

As this Court stated in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988), and as we discussed in Part I of this brief, "[t]he distinguishing features of the factual issues that typically dominate in disparate impact cases do not imply that the ultimate legal issue is different than in cases where disparate treatment analysis is used."[15] As the Court in *Watson* further stated, one advantage of disparate impact analysis is that it gets at "the problem of subconscious stereotypes and prejudices," *id.* at 990, which may not be "adequately policed" by disparate treatment analysis and a requirement of providing "discriminatory intent." *Id.* These are additional reasons why it is likely to be a rare case in which an employer cannot establish a defense to an ADA action under §§ 12112(b)(3)(A) or (b)(6) but would clearly succeed in defending an Equal Protection Clause case.

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[15] Shifting the burden of persuasion from plaintiff to employer, as the ADA appears to have done and as the 1991 Civil Rights Act did for Title VII, may be a significant change, but it is procedural, not substantive, and thus does not affect the argument in this brief.

We do not deny that there will be some cases in which a plaintiff succeeds in an ADA disparate impact case that would not succeed as an Equal Protection Clause case. But that fact alone—which may well result from the shifted burden of persuasion—does not establish that the substantive prohibitions of the ADA go far beyond the prohibitions of the Equal Protection Clause.

Finally, while the disparate impact provisions of the ADA are drawn from the test for "disparate impact" discrimination established in *Griggs*, their scope may be considerably more limited. Section 12112(a), the general discrimination rule, prohibits discrimination only against a "qualified individual with a disability," as we have explained, and, because §§ 12112(b)(3)(A) and (b)(6) appear to elaborate on the meaning of "discriminate" in that section, proving that one is a "qualified individual with a disability" may ultimately be found to be a requirement of suits under §§ 12112(b)(3)(A) and (b)(6). *Dicta* in some circuit court cases suggest the contrary, see, *e.g.*, *Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194, 1196 (7th Cir. 1997) (Posner, J.), but the matter is not yet settled. However this matter is ultimately resolved, a plaintiff who does not expect to establish that he or she is a "qualified individual with a disability" may have little incentive to mount a disparate impact attack on an employer's test or standard, because, as explained above, nothing in the ADA would prevent the employer from refusing to hire, promote, or retain such an individual either because of the disability or because of the other qualifications he or she cannot meet.

III. The *Amici* States Supporting Petitioners Advance a Policy Argument that Does Not Do Justice to the Equal Protection Clause.

According to the Brief of the *Amici Curiae* States in Support of Petitioners (at 18):

> "Every suit brought under the ADA diverts State resources into litigation costs—and damages awards where such damages are awarded—that could instead be used to provide services to the disabled and to other citizens of the State. In addition, litigation under the ADA discourages the States from pursuing initiatives to provide and expand core services to their vulnerable populations, and rewards such efforts with private lawsuits costing millions of dollars."

The *amici* organizations signing this brief have no interest in reducing the amount of aid that States provide to some of their most vulnerable and deserving citizens—particularly persons with disabilities so severe that they are unable to enter the employment market. But eliminating employment discrimination against those individuals who can work effectively reduces the need for direct State aid to a substantial number of disabled individuals. More importantly, the cost of supporting disabled persons who *cannot* work cannot, consistently with the Equal Protection Clause, be imposed on the community of those disabled persons who *can* work. It should instead be shared by all citizens through taxation. The costs of remedying employment discrimination may indeed be substantial if State agencies do not take seriously their legal obligations to persons with disabilities under the Equal Protection Clause and the ADA, but Congress, through the express provisions in the ADA, and federal agencies, through the applicable regulations and interpretative guidance, have made substantial efforts to specify and clarify obligations that, as we have shown in the brief, are rooted in and closely connected to the prohibitions of the Equal Protection Clause. The States may at times lose lawsuits they should have won, because litigation is not perfect, but individuals with disabilities face the same difficulty, with fewer resources to fall back on. One may quarrel as a policy matter with Congress's decision to remedy employment discrimination

against the disabled by providing monetary relief against the unsuccessful employer-defendant when that defendant is a State agency, but the availability of such relief alone is no argument against Congress's power under Section 5 of the Fourteenth Amendment.

CONCLUSION

For the reasons set forth in Respondents' Brief and above, this Court should hold that Congress did not exceed its powers under Section 5 of the Fourteenth Amendment in making the ADA prohibitions against employment discrimination (the only provisions potentially applicable in these cases) applicable to the States and should accordingly affirm the judgment of the court of appeals in these cases.

Respectfully submitted,

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APPENDIX

APPENDIX

The *Amici* Organizations

The American Association of People with Disabilities ("AAPD") is a non-profit membership organization of children and adults with disabilities, their family members, and their supporters. AAPD's mission is to promote political and economic empowerment for the more than 56 million Americans with disabilities. AAPD was founded on the fifth anniversary of the signing of the Americans with Disabilities Act (ADA). AAPD works to ensure effective enforcement and implementation of the ADA and other civil rights laws.

AARP is a nonprofit membership organization serving more than thirty-four million persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. One of AARP's primary objectives is to strive to achieve dignity and equality in the workplace through positive attitudes, practices, and policies towards work and retirement. In pursuit of this objective, AARP has since 1985 filed more than 200 *amicus* briefs before this Court and the federal appellate and district courts. More than one-third of AARP's members are employed, and many of those with disabilities rely on the ADA to create a work place free from discrimination. The ADA's protections are especially important to AARP members because older persons have a higher incidence of disabilities than other populations.

ADAPT is a national organization, most of whose members have severe disabilities and have been institutionalized in nursing facilities and other public institutions solely because they have disabilities. ADAPT has a long history and record of enforcing the civil rights of people with disabilities and was one of the key organizations that participated in the political and legislative process that resulted in the passage in 1990 of the ADA.

The American Council of the Blind ("ACB") is a leading national consumer organization of the blind, which strives to improve the quality of life, equality of opportunity, and independence of all persons who are blind. To that end, ACB seeks to educate policymakers about the needs and capabilities of people who are blind, to assist individuals and organizations wishing to advocate for the needs of people who are blind, and to disseminate information to both the blind and sighted public. ACB was at the forefront of activity which led to the enactment of the ADA. Efforts to preserve the rights gained through that statute, and to strengthen its protections for blind people, continue through our legislative and advocacy activities aimed at increasing the accessibility of employment, information, public transportation, and programs and services of state and local governments. As a result, ACB is deeply concerned that these rights may be in jeopardy. Further, we are concerned that, if the ADA is weakened, there will be a return to previous patterns of consistent and pervasive discrimination against persons with disabilities, and particularly persons who are blind, by state and local government entities. Therefore, we believe that efforts to preserve and vigorously enforce the ADA are of paramount importance.

The American Foundation for the Blind ("AFB"), a non-profit organization founded in 1921 and recognized as Helen Keller's cause in the United States, is a leading national and international resource for blind individuals and the professionals who serve them. Its mission is to ensure people who are blind or visually impaired to achieve equality of access and opportunity that will ensure freedom on choice in their lives. It fulfills this mission primarily by preparing and disseminating information resources for the public, educating policymakers about the needs and capabilities of people who are blind or visually impaired, and advocating the development and implementation of blindness-related public policy. AFB led the field of blindness in advocating the

enactment of the ADA. Today, AFB continues its work to protect the rights of blind and visually impaired people to equal access to employment, information, and the programs and services of state and local governments. Accordingly, the AFB is profoundly concerned that these rights, which are critical to the independence, equality, and competitive productivity of people who are blind, may be in jeopardy. AFB believes that the long history of consistent and pervasive discrimination by state and local government entities warrants the preservation and vigorous enforcement of the ADA.

The American Network of Community Options and Resources ("ANCOR") is a nationwide association of 700 private, non-profit, for-profit and family care agencies that together provide support and services to more than 150,000 people with disabilities. ANCOR has thirty years of proven leadership representing private providers at the federal level. The membership services persons of all ages, income levels, sexes, and races in urban, rural, and suburban areas—supporting people wherever they live and work. Most member agencies support group homes, apartments, and other supported living arrangements in typical, stable family neighborhoods in order to best meet the needs of the people they support. Some members provide vocational and employment services through supported employment, community rehabilitation programs, and extended employment arrangements. Consequently, the case before the Court will have substantial impact on ANCOR's members.

The Arthritis Foundation is the only national, voluntary health agency seeking to prevent, control, and cure the more than 100 forms of arthritis. The organization serves over 43 million Americans with arthritis and related conditions through research, advocacy, and services. With the number of people living with these diseases predicted to rise to 60 million by 2020, the Arthritis Foundation is leading efforts to battle the nation's leading cause of disability.

Easter Seals, Inc., has been providing services that help children and adults with disabilities gain greater independence for more than 80 years. Its primary services, medical rehabilitation, job training and employment, inclusive child care, adult day services, and camping and recreation benefit more than one million individuals and their families each year at one of 400 centers nationwide. Easter Seals has also been a leading proponent of public policies that promote equality, dignity, and independence for people with disabilities. The organization championed the enactment and implementation of the ADA to prohibit discrimination against persons with disabilities in employment, transportation, telecommunications, public accommodations, and public services.

The Epilepsy Foundation® is the sole national, charitable voluntary health organization dedicated to advancing the interests of the more than two million people with epilepsy and seizure disorders. The term "epilepsy" evokes stereotyped images and fears in others that affect people with this medical condition in all aspects of life, especially employment. Since its inception, the Foundation has worked to dispel the stigma associated with seizures and has supported the development of laws that protect individuals from discrimination based on these stereotypes and fears.

The Learning Disabilities Association of America ("LDA") is a national, non-profit, volunteer organization including individuals with learning disabilities, their families, and professionals. LDA is dedicated to enhancing the quality of life for all individuals with learning disabilities and their families, to alleviating the restricting effects of learning disabilities, and to supporting endeavors to determine the causes of learning disabilities. LDA seeks to accomplish this through advocacy, education, research, and service, and through collaborative efforts. Individuals with learning disabilities are capable of joining the workforce right out of high school or going on to college, but because of their

disabilities, many were not able to do so before passage of the ADA. It was not until passage of that Act that individual with learning disabilities were assured of appropriate accommodations by private entities, licensing boards, and employers that include state and local governments.

The National Mental Health Consumers' Self-Help Clearinghouse is a national technical assistance center established in 1986. It is run by and for people who are consumers of mental health services and survivors of psychiatric illness (known as consumers/survivors). Its mission is to promote consumer/survivor participation in planning, providing and evaluating mental health and community support services, to provide technical assistance and information to consumers/survivors interested in developing self-help services, and advocating to make traditional services more consumer/survivor-oriented. As will all of the other *amici*, the Clearinghouse has an interest in helping people with mental illness live to their full potential as active members of the community.

The National Association of the Deaf, whose members are deaf and hard-of-hearing adults, parents of deaf and hard-of-hearing children, and professionals, works to safeguard the civil rights of deaf and hard-of-hearing Americans.

The National Association of People with AIDS ("NAPWA"), founded in 1983, serves as a national voice and information and advocacy resource for the nearly one million people believed to be living with HIV/AIDS in the United States. NAPWA's mission is to advocate on behalf of all people living with HIV in order to end the pandemic and the human suffering caused by HIV/AIDS. The ADA has prevented untold cases of HIV-related discrimination. NAPWA's interest in this case is to ensure that this landmark civil rights law is not narrowed in scope or weakened in the protections it affords people living with HIV/AIDS.

The National Association for Rights Protection and Advocacy ("NARPA") includes recipients of mental health and developmental disabilities services; lay, professional and self-advocates; family members; service providers; disability rights attorneys; and teachers at schools of law, social work, and public policy. It is dedicated to promoting the preferred options of people who have been labeled mentally disabled.

The National Council on Independent Living ("NCIL") is a membership organization that advances the independent living philosophy and advocates for the human rights of, and services for, people with disabilities to further their full integration and participation in society. NCIL was established in 1982 and is the leading national, cross-disability, grassroots organization run by and for people with disabilities.

The National Multiple Sclerosis Society, with over 600,000 members and 83 chapters and divisions, is dedicated to ending the devastating effects of multiple sclerosis. The Society focuses on providing services, information, and programs to people with MS and funding for MS biomedical and health services research. The Society supports efforts to increase accessibility and independence, as well as to prevent discrimination.

The National Organization on Disability ("N.O.D.") promotes the full and equal participation of America's 54 million men, women, and children with disabilities in all aspects of life. N.O.D. was founded in 1982 at the conclusion of the United Nations International Year of Disabled Persons. Funded entirely by private-sector contributions, N.O.D. is the only national disability network organization concerned with all disabilities, all age groups, and all disability issues.

The National Parent Network on Disabilities serves children, youth and adults with disabilities and their families.

The organization's goal is to help people with disabilities live a full and integrated life.

The National Senior Citizens Law Center advocates for the independence and well-being of low-income, elderly individuals, as well as persons with disabilities. Due to the high incidence of disability among the elderly population, enforcement of the ADA is of particular concern to this organization.

The Polio Society serves its nationwide membership with information and referral services, training in self-advocacy to enforce the civil rights of persons with disabilities, and support for legislation of benefit to polio survivors and the disability community at large. The members are persons with disabilities as a result of polio and post-polio syndrome ("P.P.S."). The ADA is a key element of the Polio Society's advocacy.

Volunteers of America, Inc., is a national nonprofit, spiritually-based organization providing local human service programs and opportunities for individual and community involvement. Volunteers of America is one of the nation's largest and most comprehensive charitable human services organizations, providing services to the physically, mentally, and developmentally disabled as well as to children and youth at risk, the elderly, the homeless, and other people in need. Volunteers of America helps over 1.5 million people each year. It currently operates 43 programs specifically for the developmentally disabled, providing intensive service to nearly 2,500 youth, adults, and seniors in 10 stats. The diverse programs offered include independent living training, assessment, and job placement, case management, protective services, supported and assisted living, as well as residential care and a residential camping program that began in 1941. All of these programs receive some federal, state, or local government funding.

(22)

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IN THE

Supreme Court of the United States

THE UNIVERSITY OF ALABAMA AT BIRMINGHAM, BOARD OF TRUSTEES, and THE ALABAMA DEPARTMENT OF YOUTH SERVICES,

Petitioners,

—v.—

PATRICIA GARRETT and MILTON ASH,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

AMICUS CURIAE BRIEF OF THE VOICE OF THE RETARDED, ET AL., IN SUPPORT OF AFFIRMANCE*

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Altoona-Cresson-Ebensburg Centers' Association (PA)
Association for Hunterdon Developmental Center (NJ)
Association for Retarded Citizens of Missouri
Austin State School Parent Association (TX)
Beverly Farm Foundation (IL)
Bonneville Human Development Center Parent Association (AR)
California Association for the Retarded
California Association State Hospital and Parent Councils for the Retarded
Caswell Center Parents and Friends Association (NC)
Central State ICF/MR Bingham Center Family Group (KY)
Clover Bottom Developmental Center Parent-Guardian Association (TN)
Colorado Affiliates for the Developmentally Disabled (CO)
Common Thread (AR)
Concerned Families of Hazelwood Hospital (KY)
Conway Human Development Center Parents' Association (AR)
Denton State School Family Association (TX)
Developmental Disabilities Health Alliance, Inc. (NJ)
Dixon Association for Retarded Citizens (IL)
Exceptional Children's Foundation (CA)
Fairview Families and Friends (CA)

Families and Friends United for Central Virginia Training Center (VA)
Families United Incorporated (OH)
Fernald League for the Retarded (MA)
Florida's Voice of the Retarded
Fox Center Families and Friends (IL)
Friends and Families of the Black Mountain Center (NC)
Friends of Choate (IL)
Friends of Fircrest (WA)
Friends of Rainier, Inc. (WA)
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Friends of the Jacksonville Developmentally Disabled (IL)
Glenwood Parent/Family Group (IA)
Green Line Parent Group (CA)
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Idaho State School and Hospital Parent-Guardian Association
Illinois League of Advocates for the Developmentally Disabled
Kankakee Association for the Mentally Retarded (IL)
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Lincoln Parents' Association (IL)
Lubbock State School Parent Association (TX)
Maine Parents and Friends Association, Inc.
Maryland Parents Association of Disabled Citizens
Massachusetts Coalition of Families and Advocates for the Retarded, Inc.
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Mental Retardation Association of Nebraska
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Mental Retardation Association of Utah
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Misericordia Family Association (IL)
Murray Parents Association (IL)
National Alliance Of The DisAbled
New Lisbon Developmental Center Family and Friends Association (NJ)
North Jersey Developmental Center Parents Council (NJ)
Northern Wisconsin Center Parents Group
Ohio League for the Mentally Retarded
Ohio MRDD Parents Speak
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Parent Association for the Retarded of Texas, Inc.
Parents and Associates of the Institutionalized Retarded of Virginia
Parents and Associates of Northern Virginia Training Center
Parents and Friends of Hammond Developmental Center Association (LA)
Parents and Friends of Ludeman Center (IL)
Parents and Friends Volunteer Association (OH)
Parents Association of Northwest Louisiana Developmental Center
Parents Coordinating Council and Friends (CA)
Parents of Adult Children Concerned for Tomorrow (IL)
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Parents, Relatives and Friends of Polk (PA)
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Porterville Developmental Center Parents Group, Inc. (CA)
Richmond State School Parents Association (TX)
Rosewood Center Auxiliary, Inc. (MD)
Save Agnews Now (CA)
Sonoma Development Center Parent Hospital Association

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Southern Wisconsin Center Parent Committee
Southwest Developmental Center Parents Association (LA)
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Preliminary Statement

This is an *amicus curiae* brief on the merits submitted, on consent, by Voice of the Retarded ("VOR")[1] in support of the Americans With Disabilities Act, 42 USC §§ 12101 *et seq.* ("ADA"). 93 *amici*, disability rights organizations, join in this brief.[2]

Interest of the VOR Amici

A frequent critic of how the ADA is applied, VOR and its *amici* nevertheless defend the constitutionality of the statute here. We offer a unique perspective in this brief.

VOR is an advocacy organization incorporated in Illinois, dedicated to insuring that individuals with mental retardation receive the care and support they require in a setting appropriate to their needs. Depending on the unique condition of each person, that appropriate setting could be community placement or institutional treatment. A spectrum of choices must be available.

VOR most recently offered its views to this Court, on behalf of 142 *amici*, in *Olmstead* v. *L.C.*, 527 US ___; 119 S. Ct. 2176; 144 L. Ed. 2d 540 (1999), arguing that the ADA contemplated institutional care as the most integrated setting for some people with mental retardation. The Court accepted and quoted VOR's position in its opinion. (527 US at ___; 144 L. Ed. 2d at 561; 119 S. Ct. at 2189.)

VOR has also filed an *amicus* brief here in *Heller* v. *Doe*, 509 US 312 (1993), and a petition for *certiorari* in

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[1] Pursuant to this Court's Rule 37.6, VOR represents that no counsel to any party authored this brief, in whole or in part. VOR has paid disbursements and its counsel's fee.

[2] Their names begin at p. i, *supra*.

Parent-Guardian Association of Arlington Developmental Center v. *People First of Tennessee*, *cert. denied*, 119 S. Ct. 510 (1998)[3], arguing in each case for the primacy of the decisions of the person with disabilities and her family. This position was enacted as a statement of policy in the Developmental Disabilities Assistance and Bill of Rights Act Amendments of 1994, 42 USC § 6000(c)(3).

From VOR's perspective, the ADA means well, but has been interpreted badly whenever wielded as a sword to dismantle the institutional option.[4] The proper application of the statute was well illustrated by a question from the bench during the *Olmstead* oral argument:

> ". . . I'm also concerned about the possibility that if we adopt the [integration] rule in its strongest form . . . the States, in order to avoid the risk of liability, would have a motive and incentive to push people out into the community [who] should not go in that direction. . .". (Oral argument tr. at p. 38; see, also, 527 US at ___; 144 L. Ed. 2d at 563-4; 119 S. Ct. at 2191-2; Kennedy, J., concurring.)

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[3] Opinion below, 145 F. 3d 1332 (6 Cir. 1998).

[4] In VOR's view, *Olmstead* is properly interpreted to provide community placement when, on the facts of each case, such placement is medically appropriate; is endorsed by the disabled person, or her proper representative, and can be reasonably accommodated. VOR also argues that the converse is true: when, on the facts of each case, institutional placement is found to be medically appropriate; is endorsed by the disabled person, or her proper representative, and can be reasonably accommodated. To our surprise, this "converse" proposition has been strenuously resisted. See, *e.g.*, *Richard C.* v. *Snider*, No. 99-3841, slip op, pp. 8-9 (3 Cir.; July 25, 2000, directed to be unreported; *dictum*), and letter of Hon. Donna E. Shalala, Secretary of the Department of Health and Human Services, to all U.S. Governors, dated 14 January 2000, and enclosures directed to each state's "Medicaid Director".

VOR urges this Court to sustain the constitutionality of a good and helpful statute, and to reiterate that institutional placement, in a factually proper case, remains an option and a right.

Summary of Argument

In this submission, we remind the Court that federal protection of people with disabilities against state action began 135 years ago, as part of the Fourteenth Amendment process.

To the extent the intent of the framers of the Fourteenth Amendment is pertinent to authorization of the ADA under Amdt. XIV, § 5, protection of people with disabilities was included (*A*, below), and state sovereign immunity under the Eleventh Amendment was repealed (*B*, below).

We also fully support the views of respondents and other *amici* that the ADA is a congruent and proportional remedy for the evil of invidious discrimination.

ARGUMENT

I. THE ORIGINAL INTENT AND COVERAGE OF THE FOURTEENTH AMENDMENT:

A. AUTHORIZES THE ADA, AND

B. REPEALS ELEVENTH AMENDMENT SOVEREIGN IMMUNITY FOR STATE ACTION WITHIN ADA COVERAGE.

A 5-4 majority of this Court has recently cautioned against "a substantive redefinition of the Fourteenth Amendment right at issue". *Kimel* v. *Florida Board of Regents*, ___ US ___, at ___; 120 S. Ct. 631, at 644;

___ L. Ed. 2d. ___, at ___ (Jan. 11, 2000). As Justice Kennedy put it for the Court in *City of Boerne* v. *Flores*, 521 US 507 (1997):

> "Congress does not enforce a constitutional right by changing what the right is." (521 US at 519.)

In this submission, VOR examines "what the right is" by revisiting the original concept of the framers of the Fourteenth Amendment.[5] See *City of Boerne*, *supra*, 521 US at 525; *City of Newport* v. *Fact Concepts, Inc.*, 453 US 247, at 263-4 (1981).

A. Original Intent: Disability Coverage

The Fourteenth Amendment was one of three addressing post-Civil War remedies. Two were "single-issue" amendments: the Thirteenth, abolishing slavery, and the Fifteenth, creating voting rights. A broader sweep was given to the Fourteenth, with multiple issues presented in the four-section substantive text; the standard enabling clause became its fifth. (Amdt. XIV, § 5.).[6]

The scope of the problem addressed by the three amendments encompassed wounded Union Army survivors. Included in "gross [casualty] totals that staggered the mind" was:

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[5] The Court need not reach this issue if it concludes, as VOR does, that the ADA satisfies this Court's tests of specific legislative intent to waive Eleventh Amendment immunity, and the "congruence and proportionality" of the ADA remedy.

[6] In the other two post-Civil War amendments, the legislative enabling clause was § 2. (Amdt. XIII, § 2; Amdt. XV, § 2.) So it has been five times since, for prohibition (Amdt. XVIII, § 2); voting by gender (Amdt. XIX, § 2); District of Columbia electors (Amdt. XXIII, § 2); elimination of the poll tax (Amdt. XXIV, § 2), and voting by age (Amdt. XXVI, § 2).

"the list of [Union] wounded who recovered, two hundred and seventy-five thousand more."[7]

A Thomas Nast cartoon captured the spirit of the three amendments: a uniformed Union black veteran, freed from slavery, appears at the polling place as the figure of Liberty asks, "And Not This Man?"[8] (App. 1a.) Notably, the solider's right leg is amputated.

While case law has properly focused on the sweeping general provisions of the first clause of the Fourteenth Amendment, the balance of the substantive clauses reflect the national concerns of the time: loss of representation upon resistance to emancipation or denial of voting rights (Amdt. XIV, § 2); denial of federal office to certain former Confederates (Amdt. XIV, § 3); illegality of assumption of Confederate debts (Amdt. XIV,§ 4, second sentence), and elimination of a claim for loss or emancipation of a slave (*ibid.*). Expressly included was a clause protecting pensions of Union Civil War veterans. (Amdt. XIV, § 4, first sentence.)

VOR respectfully submits that this reading of the full Fourteenth Amendment, in view of the crucible through which the nation had just passed, would include a rudimentary protection of disabled soldiers, and a concern for their nondiscriminatory treatment. The Fourteenth Amendment enabled a great range of legislation for a great many legislative objects. These 1865 goals are perfectly consistent with the ADA, and would include that

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[7] Charles and Mary Beard, *The Rise of American Civilization* (MacMillan, 1933), II, p. 99. Accurate Confederate records of their wounded were unavailable. *Ibid.*

[8] Harper's Weekly, Aug. 5, 1865, as reproduced in Eric Foner, *A Short History of Reconstruction* (Harper & Row, 1990), facing p. 145.

statute within the legislation authorized by Amdt. XIV, § 5.

B. Original Intent: Repeal of Eleventh Amendment Sovereign Immunity

An inquiry into the enactment of the Fourteenth Amendment revisits the painful history of Reconstruction, and the fascinating historical record created by the joint Senate-House "Committee of Fifteen".

We outline one portion of this record: the expressed intent of the drafters of the Fourteenth Amendment to abrogate the states' Eleventh Amendment immunity, in order to effectuate the goals of Congressional Reconstruction.

Representative John A. Bingham (R-Ohio) drafted the broad protections involved in this litigation (Amdt. XIV, § 1). He later advised Congress that his intent was to reverse the result of *Barron* v. *Mayor and Council of Baltimore*, 7 Peters 243 (1833), which held that the Bill of Rights offered no protection against confiscation by a state or its subdivisions. "Word for word and syllable for syllable", Rep. Bingham copied Fifth Amendment protections against the national government into the final draft of the proposed Fourteenth. The goal was to create state responsibility by removing Eleventh Amendment immunity[9]—a view endorsed by this Court in, *e.g.*, *Fitzpatrick* v. *Bitzer*, 427 US 445 (1976), and *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank*, 527 US 627, at ___; 119 S. Ct. 2199, at 2205-6; 144 L. Ed. 2d 636, at ___ (1999).[10]

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[9] Charles and Mary Beard, *supra*, pp. 111-3, *passim*. The pertinent portions of Amdt. XIV, § 1, read "No State shall. . .."; "nor shall any State deprive . . . nor deny. . .".

[10] For the earlier drafting history of the Fourteenth Amendment, see Point III(A)(1) of this Court's opinion in *City of Boerne* v. *Flores*, *supra*, 521 US at 520-3.

C. Summary

Whatever this Court's result may be, it should not violate the historical record of the concerns prompting enactment of the Fourteenth Amendment.

Over a quarter million wounded Union troops were included in the post-war remedy, a factor which enfolds disability within the scope of the Fourteenth Amendment. (*A*, above.) Repeal of state sovereign immunity, to the extent necessary for the effectiveness of the Fourteenth Amendment, was clearly intended. (*B*, above.)

As we understand *City of Boerne*, *supra*, and its progeny, a showing of nineteenth-century intent to include people with disabilities within the scope of the Fourteenth Amendment, and to repeal Eleventh Amendment immunity to the extent necessary for the Civil War Amendments, will support the constitutionality of the ADA. From VOR's unique perspective as an advocate for some of today's most severely disabled people, we are pleased to offer the Court our views as an alternate or additional ground for affirmance.

Conclusion

For the reasons advanced above; in the other *amici* submissions in favor of respondents, and in respondents' own submissions, VOR and its *amici* submit that the Court of Appeals should be affirmed.

Dated: New York, New York
August 10, 2000

Respectfully submitted,

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RETREAT FROM RECONSTRUCTION

"And Not This Man?" (*Harper's Weekly*, August 5, 1865)

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—v.—

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BRIEF OF LAMBDA LEGAL DEFENSE & EDUCATION FUND, INC., THE AMERICAN CIVIL LIBERTIES UNION, THE ANTI-DEFAMATION LEAGUE, THE CALIFORNIA WOMEN'S LAW CENTER, THE CENTER FOR WOMEN POLICY STUDIES, THE FRIENDS COMMITTEE ON NATIONAL LEGISLATION, GAY AND LESBIAN ADVOCATES AND DEFENDERS, THE HUMAN RIGHTS CAMPAIGN, THE NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, THE NATIONAL COUNCIL OF JEWISH WOMEN, THE NATIONAL GAY AND LESBIAN TASK FORCE, THE NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES, THE NATIONAL URBAN LEAGUE, THE NATIONAL WOMEN'S LAW CENTER, THE NATIONAL YOUTH ADVOCACY COALITION, THE NORTHWEST WOMEN'S LAW CENTER, NOW LEGAL DEFENSE AND EDUCATION FUND, PEOPLE FOR THE AMERICAN WAY FOUNDATION, WOMEN EMPLOYED, AND THE WOMEN'S LAW PROJECT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*

This *amici curiae* brief is submitted on behalf of Lambda Legal Defense and Education Fund, Inc., the American Civil Liberties Union, the Anti-Defamation League, the California Women's Law Center, the Center for Women Policy Studies, the Friends Committee on National Legislation, Gay and Lesbian Advocates and Defenders, the Human Rights Campaign, the National Asian Pacific American Legal Consortium, the National Council of Jewish Women, the National Gay and Lesbian Task Force, the National Partnership for Women and Families, the National Urban League, the National Women's Law Center, the National Youth Advocacy Coalition, the Northwest Women's Law Center, the NOW Legal Defense and Education Fund, People for the American Way Foundation, Women Employed, and the Women's Law Project.[1]

By written consent of the parties,[2] *amici curiae* submit this brief in support of Respondents, Patricia Garrett and Milton Ash.

SUMMARY OF ARGUMENT

The central issue in this case is whether the remedies afforded by the Americans with Disabilities Act (ADA) are appropriate legislation pursuant to Congress' power under § 5 of the Fourteenth Amendment to remedy and to deter

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[1] Statements of interest of the each of the *amici* organizations are included in the Appendix to this brief.

[2] Letters of consent from the parties have been filed separately with the Clerk of the Court. This brief has been authored in its entirety by undersigned counsel for the *amici*. No person or entity, other than the named *amici* and their counsel, made any monetary contribution to the preparation or submission of this brief.

unconstitutional state conduct. Legislation that clearly states Congress' intent to abrogate the states' Eleventh Amendment sovereign immunity is valid under § 5 if there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores* 521 U.S. 507 (1997). The evidence of the states' participation in the institutionalized exclusion of those with disabilities throughout society, and the need for remedial measures to end unconstitutional state action, demonstrate that the ADA was a congruent and proportional use of Congress' § 5 powers.

At the time of the ADA's drafting, the widespread inaccessibility of public facilities and programs reflected states' embrace of the presumed unfitness and consequent exclusion of people with disabilities, and the incorporation of those assumptions into the bricks and mortar of their institutions. The evidence of wide-scale unwillingness on the part of state officials to hire those with disabilities on the basis of others' discomfort and presumptions of unfitness further buttress the foundation for a broader federal remedy.

It is clear that much of the state discrimination documented at the time of the ADA's adoption would not stand up to even the minimal constitutional yardstick of rational basis scrutiny under the Fourteenth Amendment's equal protection clause. Intentional exclusion of persons with disabilities from a host of state jobs and services for no reason other than the fact of their disabilities, and the prejudice attendant to that fact, cannot survive rational basis scrutiny. The ADA also responds to state conduct that impinges fundamental rights, such as the right to raise one's children without unnecessary state intrusion, and consequently triggers strict scrutiny in many contexts.

The emphasis of the ADA is on eradicating prejudice and intentional discrimination, and protects only those with disabilities who in effect can demonstrate that they are similarly situated to others who seek or hold the job or service

at issue. In fashioning a proportional response to the pervasive problem of disability discrimination, Congress recognized that the unique aspects of discrimination against individuals with disabilities require a different set of remedies than those provided in other civil rights statutes. The nature of these remedies — including reasonable accommodations and modifications of policies, practices or structures which preclude the participation of the differently-abled — reflects the nature of disability-based discrimination.

The reasonable accommodation requirement is an essential part of ending discrimination against people with disabilities; without it, intentional discrimination insulated with the moat of steep stairs, narrow doorways, and other more subtle barriers to the free egress and participation of those with disabilities would remain unassailable. To the extent the ADA reaches beyond the Constitution's requirements, it does so only to the degree necessary to secure the integration essential to combating prejudice and deterring further unconstitutional conduct.

ARGUMENT

THE ADA IS A CONGRUENT AND PROPORTIONAL RESPONSE TO THE HISTORY OF STATES' UNCONSTITUTIONAL DISABILITY-BASED DISCRIMINATION BECAUSE THE ADA PROHIBITS CONDUCT THAT IS EITHER FORBIDDEN BY THE CONSTITUTION OR LIKELY TO PERPETUATE UNCONSTITUTIONAL TREATMENT OF THOSE WITH DISABILITIES.

Introduction

While the Eleventh Amendment bars suits in federal

courts against nonconsenting states, § 5 of the Fourteenth Amendment grants Congress the authority to abrogate the States' sovereign immunity in order to enforce that amendment's provisions. *Kimel v. Florida Board of Regents*, 120 S. Ct. 631, 640, 644 (2000). There is no dispute that Congress clearly stated its intent to abrogate states' immunity in its enactment of the ADA. The question presented here is whether the ADA is appropriate remedial legislation pursuant to Congress' power under § 5 to remedy and to deter unconstitutional state conduct.

As this Court recognized in *City of Boerne v. Flores*, 521 U.S. 507 (1997), Congress must be afforded much deference in its determinations as to "whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Id.* at 536. Congress' power in this regard is both to remedy and to deter constitutional violations, and consequently encompasses the authority to prohibit that which the Fourteenth Amendment itself does not prohibit. *Id.* at 518.

However, Congress' power to enact remedial legislation cannot cross the line into a "substantive redefinition of the Fourteenth Amendment right at issue," *Kimel*, 120 S. Ct. at 644; *see also City of Boerne*, 521 U.S. at 519-20. "Recognizing that 'Congress must have wide latitude in determining where [that line] lies,'" *Kimel*, 120 S. Ct. at 644, *quoting City of Boerne*, 521 U.S. at 520, the Court articulated an elastic rather than bright line test. Accordingly, legislation intended to abrogate the states' immunity from private damages actions in federal court is valid under § 5 if there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Kimel*, 120 S. Ct. at 644; *City of Boerne*, 521 U.S. at 520. In *City of Boerne* and *Kimel*, the Court applied this test by assessing the extent to which each law rested on a record of unconstitutional conduct on the basis of religion (*City of Boerne*) or age (*Kimel*), and the corresponding scope of the

prohibitions against constitutional state conduct. *City of Boerne*, 521 U.S. at 520, 531-32 ; *Kimel*, 120 S. Ct. at 645, 648. Neither aspect of the analysis, standing alone, was dispositive of the Court's conclusion that both the Religious Freedom Restoration Act (RFRA) and the Age Discrimination in Employment Act (ADEA) failed the congruence and proportionality test. In both cases, however, the Court found a record empty of unconstitutional state conduct, coupled with an incongruent, exceedingly broad reach into state conduct that targeted very little likely to be unconstitutional. *See City of Boerne*, 521 U.S. at 533-34; *Kimel*, 120 S. Ct. at 650.

The ADA satisfies the test articulated in *Boerne* and developed in *Kimel* to assess the validity of Congressional exercises of its remedial powers under § 5. *First*, a long and persistent history of state discrimination existed, and was reflected in the legislative history, as a predicate to the ADA. *Second*, much of the activity prohibited by the ADA also is intentional discrimination forbidden by the Constitution. *Third*, to the extent the ADA's requirements reach beyond those of the Constitution, they do so to remedy or prevent unconstitutional conduct in a manner that ensures minimal interference in the business of the states. Congress accomplished this through a careful balance of the nature of disability-based discrimination, and the need for greater integration of those with disabilities into the larger society, with the recognition that disability sometimes can be relevant to legitimate state interests.

I. CONGRESS CRAFTED THE ADA IN RESPONSE TO A DOCUMENTED HISTORY OF PERVASIVE, INSTITUTIONALIZED, AND UNCONSTITUTIONAL EXCLUSION OF PEOPLE WITH DISABILITIES FROM ALL ASPECTS OF SOCIETY.

A. Congress Had Ample Evidence of Discriminatory State Conduct Against People With Disabilities.

The Petitioner's picture of robust state hospitality toward people with disabilities blurs the truth of a far more hostile history. Its assertion that, in its consideration of the ADA, "Congress failed to establish any record of constitutional violations by State governments"[3] is belied by the record itself.

Congress summarized the scope of the problem in its findings in the ADA: that individuals with disabilities have been "subjected to a history of purposeful unequal treatment," and that this treatment has occurred "in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. § 12101. Roughly half of these basic areas represent enterprises which largely, or exclusively, are the province of state government.[4]

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[3] Brief of Petitioner at 21.

[4] "[T]he express congressional findings with respect to pervasive discrimination address many areas that are controlled to a significant degree by state and local governments. For example, Congress identified discrimination in education as a particular problem. *See* 42 U.S.C. § 12101(3). Education in this country is overwhelmingly an enterprise of state and local government. Another sector singled out in the statute was

Consistent with testimony documenting the impact of bias on employment opportunities for people with disabilities, the 1989 report of the Congressionally-created Advisory Commission on Intergovernmental Relations described the sobering results of a poll of state agency officials to determine the causes of the underemployment of person with disabilities in State jobs.[5] Most of the state officials polled (82.7%) stated that "negative attitudes/misinformation" had a "strong" or "moderate" impact on state hiring of individuals with disabilities.[6] They described the "significant" impact of attitudes which ranged from "feelings of discomfort in associating with disabled individuals" to "inaccurate assessments of their productivity." *Id.* at 73. Congress also had other evidence of the broad, intractable resistance to public employment of individuals with disabilities; twenty-three jurisdictions surveyed, for example, were unwilling to hire blind applicants, while many excluded applicants with a

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health services, *see* 42 U.S.C. § 12101(3), in which state and local governments also play a powerful role. The same is true for transportation, also mentioned in § 12101(3). Congress' specific attention to sectors with such a substantial state and local governmental presence indicates that it knew that government action at the state level was an important part of the problem it was addressing." *Erickson v. Board of Governors of State Colleges and Universities for Northeastern Illinois University*, 207 F.3d 945, 957-58 (7th Cir. 2000) (Wood, J., dissenting) (footnotes omitted). *See also* A & P S. Rep. 101-116, at *16; A & P Comm. Print 1990 (28A), at *315 (1988) (referencing testimony about existence of architectural, transportation, and communication barriers as critical reasons preventing individuals with disabilities from full use of transportation and public accommodations).

[5] *See* Advisory Commission on Intergovernmental Relations, Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal (April 1989) [hereinafter "ACIR REPORT"].

[6] ACIR Report, *supra* n.6, at 72.

history of cancer. *See* 135 Cong. Rec. S4984, S4988 (daily ed. May 9, 1989) (remarks of Sen. Jeffords).[7]

The ability of individuals with disabilities to gain access to government institutions and services has a profound impact not only on the feasibility of securing employment, but also on the ability to take part in a vast range of important programs, even the ability to exercise recognized rights. In the area of physical accessibility, Congress learned that state governments long assumed homogeneously impairment-free citizenship in the construction of its public facilities and programs, with the concomitant exclusion of those whose characteristics fall outside that assumption:

> The extent of inaccessibility was illustrated by a 1980 study of State-owned buildings, housing services and programs available to the general public. The study found *76 percent of the buildings physically inaccessible and unusable for serving handicapped persons*, even when taking into account the option of moving programs and services to other parts of the building or otherwise restructuring them.

U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 38-39 (1983) (emphasis

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[7] Congress also was aware of state employment discrimination cases brought by individuals with disabilities, including the growing problems of irrational discrimination experienced by employees with AIDS. *E.g., Pushkin v. Regents of the University of Colorado*, 658 F.2d 1372, 1387 (10th Cir. 1981) (refusal to admit physician with multiple sclerosis to psychiatry residency program); *Chalk v. U. S. District Court*, 832 F.2d 1158 (9th Cir. 1989) (teacher with AIDS removed from classroom instruction); *Schmidt v. City of Chicago*, No. 86-C-8031, 1988 U.S. Dist. LEXIS 12893. *See Conroy v. Aniskoff*, 507 U.S. 511, 516, 516 n.10 (1993) (noting presumption that Congress is aware of relevant case law).

added) [hereinafter "Accommodating the Spectrum"].[8] Congress also heard individual testimony on the lack of access to public facilities as central as court houses.[9] And as of 1984, when Congress considered adoption of the Voting Accessibility for the Elderly and Handicapped Act, 42 U.S.C. § 1973ee, it learned that many state polling places were physically inaccessible and that only *four* states required accommodations and modifications to ensure the disabled physical access to the voting booth.[10] Just several years before Congress began its consideration of the ADA, it became clear through the case of *Hill v. Shelby County*, 599 F. Supp. 303, 304 (N.D. Ala. 1984), that *all* Alabama state courts routinely excused individuals with disabilities from jury service because they were not equipped to accommodate them.[11]

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[8] This 1983 report by the U.S. Commission on Civil Rights was featured repeatedly in Congressional Committee reports, and described the multiple causes and consequences of the many years of exclusion of disabled people from the mainstream of American life.

[9] *See, e.g., Americans with Disabilities Act, Joint Hearing on H.R. 4498 and S. 2345 Before the Subcommittee on Select Education and the Subcommittee on the Handicapped*, 101st Cong., 2d Sess. (1988) (testimony of Sandra Parrino) (refusal of states to build accessible public facilities, including town halls); *Americans with Disabilities Act, Hearing on H.R. 4498 Before the Subcommittee on Select Education*, 101st Cong., 2d Sess. (1989) (statement of Emeka Nwojke) (concerning inaccessibility of court houses and court rooms).

[10] *See also* 135 Cong. Rec. S10793 (daily ed. Sept. 7, 1989) (statement of Sen. Biden) (describing the experience of a constituent who had to either hire an ambulance or crawl in order to vote); *id.* at S10753 (statement of Sen. Gore) (commenting on "the tradition of blatant and subtle discrimination" of states in failing to accommodate voters with disabilities).

[11] Accessible transportation was a significant aspect of the problem, and had a causal relationship to some of the isolation of those with

Some of the uglier accounts of disability-based discrimination involved children. For example, the legislative record includes testimony about a public school's refusal to admit a wheelchair-bound child because of concerns that he presented a "fire hazard," S. Rep. No. 101-116, at 7 (1990); and another public school's decision to exclude a child with cerebral palsy based on the "nauseating effect" of his appearance on other students. *Id.* (quoting 117 Cong. Rec. 45974 (1971) (statement of Rep. Vanik)). *See also Martinez v. School Board, Florida*, 861 F.2d 1502 (11th Cir. 1988) (segregation of mentally retarded student with AIDS by glass wall separating her from her classmates); *Robertson v. Granite City Community8Unit School District No. 9*, 684 F. Supp. 1002 (S.D. Ill. 1987) (exclusion of first grade student with AIDS from his regular classroom); *Ray v. School Dist. of DeSoto County*, 666 F. Supp. 1524 (M.D. Fla. 1987) (school district refused to allow HIV positive siblings to remain in school); *Thomas v. Atascadero Unified School District*, 662 F. Supp. 376 (C.D.Cal. 1986) (exclusion of child with AIDS from kindergarten); *Doe v. Dolten Elementary School District No. 148*, 694 F. Supp. 440 (N.D. Ill. 1988) (exclusion of child with AIDS from classroom).

State discrimination against the institutionalized disabled has been particularly severe, and ongoing. State-

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mobility impairments. *See e.g.*, Testimony of Jay Rochlin, Executive Director of the President's Committee on Employment of People with Disabilities before the House Subcommittee on Select Education and Employment Opportunities, Ser. No. 101-151,at 29 (Sept. 13, 1989), *cited in* H.R. Rep. No. 101-485(II), at 37 (1990) (surveys done in 45 communities documented inadequate accessible public transportation services); Testimony of Speed Davis, Assistant Director of the Massachusetts Office of Handicapped Affairs before the House Subcommittee on Select Education, Ser. No. 100-109, at 222 (Oct. 24, 1988) , *cited in* H.R. Rep. No. 101-485(II), 37 (1990) (discussing repeated instances of disabled individuals turning down jobs because they could not arrange reliable transportation).

operated facilities have "essentially warehous[ed] patients in an inhumane environment,"[12] maintained conditions in which "[i]nfectious diseases were common[,]... minimally adequate health care was unavailable, ... [a]ssaults on residents by staff members, including sexual assaults, were frequent, ... [d]angerous psycho tropic drugs were indiscriminately used ...,"[13] and "[c]lients lay half-naked and unattended in their own urine and feces on cold floors in dismal surroundings while untrained attendants watched television."[14] Institutionalized people also have had to counter the presumptions of incompetence manifested in denial of voter registration or use of absentee ballots.[15]

As the U.S. Commission on Civil Rights documented, state discrimination even has been evident in a spectrum of core activities, from the rights afforded other citizens to vote, hold public office or serve on juries,[16] to basic personal

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[12] *Wyatt ex rel. Rawlins v. Rogers*, 985 F. Supp. 1356, 1362 (M.D. Ala. 1997) (describing Alabama state's mental health facilities).

[13] *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 128 n.1 (1984) (Stevens, J., dissenting).

[14] *Society for Good Will to Retarded Children v. Cuomo*, 745 F. Supp. 879 (E.D.N.Y. 1990).

[15] *E.g., Boyd v. Board of Registrars of Voters of Belchertown*, 334 N.E.2d 629, 632 (Mass. 1975) (refusal to allow institutionalized individuals to register to vote); *see also I/M/O Absentee Ballots Cast By Five Residents of Trenton Psychiatric Hospital*, 750 A.2d 790, 791-92 (N.J. 2000) (refusal to accept absentee ballots of Trenton Psychiatric Hospital on the presumption of their incompetence).

[16] Some state courts have been sued because of policies barring disabled individuals from participating in judicial proceedings. *See Galloway v. Superior Ct.*, 816 F. Supp. 12 (D.D.C. 1993). *See also State v. Spivey*, 700 S.W.2d 812, 813 (Mo. 1985) (affirming exclusion of "deaf, mute, deaf-mute and blind persons" from jury pool because "[w]e

decision-making[17] and from entering contracts, to choosing to marry[18] and raise children.[19] Accommodating the Spectrum, *supra*, at 8.

In short, "[t]he record before Congress ... evidenced that discrimination against disabled people persisted in government programs,"[20] and that "Congress was aware" that "state and local officials, consciously and intentionally, out of animus and ignorance, segregated persons with disabilities" and treated them "as not only inferior, but also as

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doubt that deaf persons have a community of attitudes or ideas"); *DeLong v. Brumbaugh*, 703 F. Supp. 399, 406 (W.D. Pa. 1989) (State superior court judge testifying that he "would disqualify a deaf person under all circumstances").

[17] *See Poe v. Lynchburg Training School and Hospital*, 518 F. Supp. 789 (W.D. Va. 1981) (class action lawsuit by former Virginia state institutions who were involuntarily sterilized).

[18] *See* Utah Code Ann. § 30-1-2(1) (1987) (providing that marriage with "persons afflicted with acquired immune deficiency syndrome" is "prohibited and ...void"). Only after the ADA went into affect was the law successfully challenged. *T.E.P. v. Leavitt*, 840 F. Supp. 110 (D. Utah 1993).

[19] Even in the years shortly preceding, and immediately following, the ADA's adoption, state courts repeatedly found that having a parent with a disability was not in a child's best interests. *E.g., Stewart v. Stewart*, 521 N.E. 2d 956 (Ind. 1988) (denial of custody to parent with HIV); *H.J.B. v. P.W.*, 628 So. 2d 753 (Ala. 1993) (termination of father's parental rights based on his infection with HIV); *Bednarski v. Bednarski*, 366 N.W.2d 69 (Mich. 1985) (reversing termination of deaf woman's custody of her "two normal children").

[20] *See* Stephen L. Mikochik, *The Constitution and the Americans With Disabilities Act: Some First Impressions*, 64 Temp. L. Rev. 619, 623, 623 n.33 (1991).

dangerous."[21] Petitioners offer no legitimate state justification for these severe incursions into the basic rights of the disabled; rather, they simply ignore their existence.

The Petitioner's recitation of the short list of record references to positive state action on behalf of the disabled is beside the point. Even if states protected the disabled as frequently as they abused them, the question is whether there is sufficient evidence of unconstitutional state conduct to warrant the ADA's enactment as legitimate remedial legislation. This Court's prior decisions do not suggest that a limited record of correct behavior eclipses the overwhelming testimony about the discrimination that infected public institutions;[22] nor must Congress identify every unconstitutional state harm that could serve as a predicate to a

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[21] Timothy M. Cook, *The Americans With Disabilities Act: the Move to Integration*, 64 Temp. L. Rev. 393, 397-98 (1991).

[22] Testimony concerning favorable state treatment of those with disabilities is more than countered by testimony to the contrary. In the area of employment, for example, some of the testimony Congress heard included accounts of the denial of teacher certification to a woman with paralysis of the legs. S. Rep. No. 101-116, at 7 (1990); New York State's refusal to hire blind rehabilitation counselors, *Americans With Disabilities Act: Hearing on H.R. 4498 Before the Subcommittee on Select Education*, 101st Cong., 2d Sess. (1988); a state mental retardation facility's refusal to hire a job applicant with a mobility impairment, *id.* At 1225; the routine refusal of California state agencies to hire cancer survivors, *Americans with Disabilities Act, Hearing on H.R. 2273 Before the Subcommittee on Select Education*, 101st Cong., 2d Sess. (1989) (statement of Arlene Mayerson); and a state university's firing of a professor of veterinary medicine because he had AIDS. *Americans with Disabilities Act: Hearing on S. 933 Before the Senate Comm. On Labor and Human Resources,* 101st Cong., 2d Sess. (1989) (statement of National Organizations Responding to AIDS). Moreover, that states may have enacted "special programs" for the disabled does not take away from their repeated failure to treat them equally in state employment and general state programs.

legitimate exercise of its § 5 powers.[23] Congress had available to it clearly sufficient evidence of state discrimination against individuals with disabilities that was unconstitutional even under a rational basis analysis.

While it is state conduct, not the existence of state laws, which is relevant to the Court's congruence and proportionality analysis, the Court has on occasion taken note of the existence of state remedies for the threat of discrimination.[24] As Petitioners point out, Congress heard testimony on the availability and nature of state disability antidiscrimination laws. Indeed, a report to Congress by a Governors' Committee representing all fifty states indicated that state laws were inadequate to redress disability-based discrimination. A & P S. Rep. 101-116, *18 (1989). As the report suggests, a close look at the substance of state antidiscrimination laws reveals a patchwork of statutes and regulations that, in many instances, fail to address areas of documented unconstitutional conduct.

At the time of the ADA's adoption, for example, at least seven states, including Alabama, did not extend antidiscrimination protections to those with mental health disabilities,[25] despite the plethora of evidence that some of the

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[23] *See Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 200, 209 (1997) (position that Congress is under obligation to develop detailed factual record "to accommodate judicial review" is "constitutionally unwarranted").

[24] *See, e.g., Florida PrePaid Postsecondary Ed Expense Bd. v. College Savings Bank*, 119 S. Ct. 2199, 2209 (1999); *Kimel*, 120 S. Ct. at 650.

[25] Ala. Code § 21-7-1 to 21-7-10 (WESTLAW through 1989) Ariz. Rev. Stat. Ann. § 41-1461(4) (West, WESTLAW through 1989); Calif. Gov't Code § 12940(West, WESTLAW through 1989); Kan. Stat. Ann. § 44-1009(a)(1) (WESTLAW through 1990); Ky. Rev. Stat. Ann. § 207.130(2), 150(1) (Michie, WESTLAW through 1989); Miss. Code

most severe forms of discrimination have been perpetrated against the mentally ill and mentally retarded.[26] In states that had prohibitions against disability-based discrimination, at least twenty-five did not provide for a reasonable accommodation.[27] And of those states that did have such a prohibition, at least nine did not expressly provide for a private right of action with damages to remedy the State's

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Ann. §43-6-15(WESTLAW through 1990); Nev. Rev. Stat. Ann. §613.330(Michie, WESTLAW through 1989)

[26] *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 461-63 (1985) (Marshall, J., concurring in part and dissenting in part).

[27] Ala. Admin. Code r. 670-X-4-.01 (WESTLAW through 2000); Alaska Stat. § 18.80.200 (WESTLAW through 1989); Calif. Gov't Code § 12940(West, WESTLAW through 1989); Conn. Gen. Stat. § 46a-60 (West, WESTLAW through 1989); Fla. Stat. Ann. § 413.08(3) (West, WESTLAW through 1989); Haw. Rev. Stat. § 378-2 (Michie, WESTLAW through 1989); Ill. Ann. Stat. Ch. 68, para. 1-102-3, 2-102 (West, WESTLAW through 1989); Ind. Code Ann. § 22-9-1-13 (Burns, WESTLAW through 1989); Iowa Code Ann. § 601A.6 (West, WESTLAW through 1989); Kan. Stat. Ann. § 44-1009(a)(1) (WESTLAW through 1990); Ky. Rev. Stat. Ann. § 207.130(2), 150(1) (Michie, WESTLAW through 1989); Me. Rev. Stat. Ann. tit. 5, § 4572 (West, WESTLAW through 1989); Md. Ann. Code of 1957, Art. 49B § 16(Michie, WESTLAW through 1989); Miss. Code Ann. §43-6-15(WESTLAW through 1990); Mo. Ann. Stat. §213.055 (West, WESTLAW through 1989); Nev. Rev. Stat. Ann. §613.330(Michie, WESTLAW through 1989); N.H. Rev Stat. Ann. § 354-A:3(XIII),A:8 (WESTLAW through 1989); N.J. Stat. Ann. §10:5-12(West, WESTLAW through 1989); N.M. Stat. Ann. §§ 28-1-2(M)-(N), 28-1-7 (WESTLAW through 1989); N.Y. Exec. Law §§ 292(21), 296 (McKinney, WESTLAW through 1989); Okla. Stat. Tit. 25, § 1301, 1302 (West, WESTLAW through 1989); S.C. Code Ann. §§ 43-33-510-580 (WESTLAW through 1989); Tenn. Code Ann. § 8-50-103(a) (WESTLAW through 1989); Utah Code Ann. § 34-35-6 (Michie, WESTLAW through 1989); Wash. Rev. Code Ann. § 49.60.180 (West, WESTLAW through 1989).

employment discrimination against the disabled.[28] Outside the employment context, at least nineteen states did not expressly provide for application to the state in prohibiting discrimination against the disabled in accessibility and accommodation,[29] and in the small set of states with an express

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[28] Ala. Admin. Code r. 670-X-4-.03 (WESTLAW through 2000); Ariz. Rev. Stat. Ann. § 41-1481(D) (West, WESTLAW through 1989) (expressly exempts state); Calif. Gov't Code § 12960(West, WESTLAW through 1989); Conn. Gen. Stat. § 46a-86 (West, WESTLAW through 1989); Ind. Code Ann. § 22-9-1-6(k)(2) (Burns, WESTLAW through 1989) (judicial review limited to respondent); Ky. Rev. Stat. Ann. § 150(1), 207.130(2), 344.040-45 (Michie, WESTLAW through 1989) (the "Civil Rights" law does not enumerate "disability" and restricts judicial review to itself); Miss. Code Ann. §§25-9-131, 43-6-15(WESTLAW through 1990) (judicial review limited to "employee," and proscription only applies to those "seeking" employment); Vernon's Ann. Texas Civ. St. art. 5221K, sec. 7.01 (WESTLAW through 1988) (1989 database not available) (only Commission can sue); Wis. Stat. Ann. § 111.39(West, WESTLAW through 1989).

[29] Calif. Civ. Code § 51(West, WESTLAW through 1989); Colo. Rev. Stat. Ann. § 24-34-601 (West, WESTLAW through 1989); Conn. Gen. Stat. § 46a-64 (West, WESTLAW through 1989); Del. Code Ann. tit. 6, § 4504 (WESTLAW through 1989); Fla. Stat. Ann. § 413.08(West, WESTLAW through 1989); Ga. Doc. Ann. § 30-4-1 (WESTLAW through 1989); Idaho Code § 56-702-703 (Michie, WESTLAW through 1989); Ind. Code Ann. § 16-7-5-2 (Burns, WESTLAW through 1989) (other coverage limited to the blind); Ky. Rev. Stat. Ann. § 258.5000 (Michie, WESTLAW through 1989) (other coverage limited to blind and deaf); Mass. Gen. Laws Ann. ch. 151B, §4(6)-(8) (West, WESTLAW through 1989); Miss. Code Ann. §43-6-5 (WESTLAW through 1990); Nev. Rev. Stat. Ann. §651.070(Michie, WESTLAW through 1989); N.M. Stat. Ann. § 28-1-2(H) (WESTLAW through 1989); N.Y. Exec. Law §§ 292(9), 296(1) (McKinney, WESTLAW through 1989); Or. Rev. Stat. §§ 30.675, 659.425 (West, WESTLAW through 1989); R.I. Gen. Laws § 42-87-3(a) (WESTLAW through 1989); Tenn. Code Ann. § 4-22-501 (WESTLAW through 1989); Utah Code Ann. § 26-30-1 (Michie, WESTLAW through 1989); Vt. Stat. Ann. title 9, § 4502 (WESTLAW through 1989); Wyo. Stat. § 35-13-201 (WESTLAW through 1989). In

prohibition, at least eight also did not expressly provide for a private right of action.[30]

The assertions of the State of Alabama on the generous scope of its state law protections for the disabled are particularly ironic. Prior to enactment of the ADA, notwithstanding that Alabama had passed a law endorsing accessibility for the disabled, it had enacted nothing more than a statement of policy providing that the physically disabled have an equal right to make use of public facilities, sidewalks, and the like; it did not provide any means of enforceability against the State.[31] Indeed, in 1984 when a disabled Alabama citizen sought to enforce § 21-7-2 in part because she could not climb the stairs to the second floor county courthouse to defend herself in a legal proceeding, the federal judge presiding over her unsuccessful claim to enforce accessibility made an observation that extends beyond its §1983 context: "Legislative recognition of a general, salutary public policy does not, without specific intent to do so, create a state

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the narrow set of states where there was express application to the state, in at least five the cited statute did not expressly prohibit the state from discriminating against the mentally disabled in accessibility and accommodation. Ala. Code § 21-7-1 to 21-7-10 (WESTLAW through 1989); Ark. Code Ann. § 20-14-303 (West, WESTLAW through 1989); Ga. Doc. Ann. § 30-4-1 (WESTLAW through 1989); Idaho Code § 56-702-703 (Michie, WESTLAW through 1989); Kan. Stat. Ann. § 44-1009(c)(3) (WESTLAW through 1990).

[30] Ala. Code § 21-7-1 to 21-7-10 (WESTLAW through 1989); Alaska Stat. § 18.80.200-295 (WESTLAW through 1989); Ark. Code Ann. § 20-14-301-306 (WESTLAW through 1989); Calif. Civ. Code § 51-52 (West, WESTLAW through 1989); Colo. Rev. Stat. Ann. § 24-34-601-602 (West, WESTLAW through 1989); Conn. Gen. Stat. § 46a-64(c) (West, WESTLAW through 1989); Ga. Doc. Ann. § 30-4-1 (WESTLAW through 1989); Idaho Code § 56-706 (Michie, WESTLAW through 1989).

[31] Ala. Code § 21-7-1 to 21-7-3 (West, WESTLAW through 1989).

property or liberty right . . . ." *Hill v. Shelby County*, 599 F. Supp. at 305. The judge further observed that the plaintiff "has nothing to complain about in a federal court unless and until the Congress of the United States specifically requires elevator access to all State courtrooms, jury deliberation rooms, and restrooms." *Id.* In fact, in *Ethridge v. State of Alabama*, 847 F. Supp. 903 (M.D. Ala. 1993), the state argued vigorously that § 21-7-8 does not create a private cause of action against the state. And, contrary to Alabama's further assertion to this Court that its internal personnel board could provide "monetary remedies," the board's list of powers included no such remedies. Ala. Code § 36-26-6 (a)(3) (West, WESTLAW through 1989).

The sobering record of state discrimination against those with disabilities is emblematic of the extent to which this prejudice had leeched into all of our social institutions. Extensive legislative testimony, supplemented by studies and reports by state and federal government agencies and Presidential commissions, indisputably documented the fact that disability-based discrimination was everywhere, and that, as one Congressional Report summarized, "individuals with disabilities have been isolated and subjected to discrimination and such isolation and discrimination is still pervasive in our society." Senate Labor Committee Report, at 2.[32]

The record compiled in advance of the ADA's

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[32] For example, one small slice of the record before Congress was provided by the National Council on the Handicapped, an independent federal agency appointed by President Reagan to investigate the status of disabled Americans. *See* A & P Comm. Print 1990 (28B), at *941 (1988). After five years of hearings, the Council reached "the same inescapable conclusions again and again: *barriers and discrimination*, rather than the inherent physical or mental characteristics of persons with disabilities themselves, are to blame for the staggering unemployment and isolation of these citizens..." A & P Comm Print 1990 (28B), at *941 (1988) (statement of Rep. Tony Coelho) (emphasis added).

adoption reveals two themes which run throughout: a plea not for new social programs or special jobs but for the removal of barriers – physical as well as those based on discomfort or other negative attitudes – to existing ones; and the inclusion of publicly-operated enterprises in the litany of areas in which barriers had proved prohibitive to those with disabilities.

The record of discrimination against those with disabilities dispenses with the argument that, like the ADEA, Congress' extension of the ADA to the states "was an unwarranted response to a perhaps inconsequential problem." *See Kimel*, 120 S. Ct. at 648-49. Congress adopted the Americans With Disabilities Act with the purpose of "bring[ing] persons with disabilities into the economic and social mainstream of American life." Senate Comm. On Labor and Human Resources, Report on the Americans With Disabilities Act, S. Rep. No. 101-116 (1990) [hereinafter "Senate Labor Comm. Report"]. Senator Hatch described the ADA as " a bill that really enfranchises 43 million Americans who have not had ... coequal treatment in our society." 135 Cong. Rec. S10714 (daily ed. Sept. 7, 1989).

B. The Relevant Constitutional Standards Demonstrate that States' Treatment of Persons With Disabilities Frequently Fell Below Minimum Fourteenth Amendment Requirements.

Under the Equal Protection Clause of the Fourteenth Amendment "[e]very person within the State's jurisdiction [is protected] against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Sioux City Bridge Co. v. Dakota County, Neb.*, 260 U.S. 441, 445 (*quoting Sunday Lake Iron Co. v. Wakefield Township*, 247 U.S. 350, 352 (1918)). Essentially, this is "a direction that all persons similarly situated should be treated alike." *City of*

Cleburne v. Cleburne Living Center, 473 U.S. at 439.

At a minimum, equal protection requires that distinctions drawn by the government be "rationally related to a legitimate governmental interest." *U.S. Dep't of Agriculture v. Moreno*, 413 U.S. 528, 533 (1973); *see also City of Cleburne*, 473 U.S. at 446. Under this standard of equal protection review, the Court engages in a two-part inquiry: first, whether a classification serves a legitimate state purpose; and second, whether the classification is rationally related to that purpose. *City of Cleburne*, 473 U.S. at 446. State conduct which does not affect a suspect class, or burden a fundamental right, will be analyzed under the rational basis test. Claims of disparate treatment in employment, for example, will be afforded this level of scrutiny. *See, e.g., Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (regarding state statute requiring retirement of police officers at age 50).

In *Cleburne*, the Court used rational basis analysis to conclude that the City of Cleburne's refusal to issue a permit to a residential home for the mentally retarded was an unconstitutional manifestation of "an irrational prejudice" against them. 437 U.S. at 450. The city's concern for the "negative attitude" and "fears" of the surrounding property owners, or the prospect of conflict between residents of the home and the surrounding community, could not support the permit denial, as "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable" in the program or subject at issue are not permissible bases for treating the mentally retarded differently. *Id.* at 448.[33] In short, disadvantaging a politically unpopular group on the basis of fears and stereotypes is unconstitutional. *Id.* at 447.

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[33] This Court also rejected the remainder of the city's objections to the facility's proposed location because the city had not raised similar objections to other facilities for the non-disabled that posed the same concerns.

As the record before Congress confirmed, most of states' treatment of the disabled was rooted in the kind of irrational prejudice *Cleburne* condemned.

It is true that the class of persons protected by the ADA are "different" in that "they suffer disability not shared by others." This Court recognized, however, that "[t]he question is whether to *treat* [them] differently." 473 U.S. at 449-50 (emphasis added). The answer here, as in *Cleburne*, is that "this difference is largely irrelevant unless [its presence] would threaten legitimate interests of the [government]..." *Id.* at 448. Reliance on factors irrelevant to legitimate state interests can be presumed "to rest on an irrational prejudice" against the disabled and consequently is violative of the Fourteenth Amendment. *See id.* at 449-50.[34]

There is no conceivable legitimate purpose which the unabashed exclusion of the disabled serves. The construction of state facilities built to accommodate only those who are able-bodied is what it is – an intentional act to include only the able-bodied. Architecture is "the science of designing and constructing buildings,"[35] and the depth of stairs, the width of entrance ways, the height of desks and counters, are far from accidental or incidental; they are designed and built to accommodate the characteristics and needs of those intended to use them. The same can be said for the creation of transportation, central to participation in the work and social fabric of society, with only the able-bodied in mind, or the

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[34] The differences between those with and without disabilities can be relevant to a number of state policies and legislation. *See Cleburne*, 473 U.S. at 454 (Stevens, J. and Berger, C.J., concurring). For example, "[a]n impartial lawmaker...could rationally vote in favor of a law providing funds for special education and special treatment for the mentally retarded." *Id.*

[35] Webster's Dictionary 98 (2d ed. 1979). Architecture, "a system or style of building," has "certain characteristics of structure." *Id.*

structure of jobs and programs that perpetuate exclusion through rigid reliance on irrelevant aspects of program design that preclude the participation of the disabled. Failure to remedy the exclusionary aspects of state facilities and programs, particularly in view of states' awareness of the disabled and policy statements professing to assist them in the years before the ADA's enactment, is intentional discrimination without any rational connection to legitimate state goals.[36] Reasonable accommodations and modifications

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[36] It simply is not equality in any genuine sense to extend an invitation to apply for state employment to all if the invitation can be accepted only by those who can climb stairway entrances, pass through narrow doorways, and attend interviews on a building's top floors without an elevator.

Intentional discrimination manifested through state officials' continued use of buildings and programs that, as a practical matter, exclude only those with disabilities also logically might be characterized as "deliberate indifference." The Court has confirmed that "deliberate indifference" is sufficient to hold a government entity responsible for its refusal to take action to prevent a harm if the plaintiff has sufficiently alleged a constitutional violation. *See Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 124 (1992); *Canton v. Harris*, 489 U.S. 378, 380 (1989); *see also Nabozny v. Poblesny*, 92 F.3d 446, 454 (7th Cir. 1996) (Plaintiff "must show that the defendants acted either intentionally or with deliberate indifference" to prove an equal protection violation); *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1153 (10th Cir. 1999) ("[I]ntentional discrimination can be inferred from a defendant's deliberate indifference to the strong likelihood that pursuit of its questioned policies will likely result in a violation of federally protected rights"). In the case of individuals with disabilities, the stereotype-based brand of discrimination evidenced by the state's continued imposition of incidental policies, practices and structures which fence them out from state facilities and institutions for no legitimate reason evidences deliberate indifference. Just as the state may not "fence in" the mentally ill "solely to save its citizens from exposure to those whose ways are different," *O'Connor v. Donaldson*, 422 U.S. 563, 574-75 (1975), it may not "fence out" those with disabilities for the same reasons, or to preserve the discriminatory status quo literally built into the structures that exclude them.

are indispensable in the breaking down of walls between the disabled and government programs and employment designed for the abled-bodied.

The intractability of barriers to the disableds' access to employment and public services raises the inevitable inference that it is born of animosity toward the class that it affects. It simply cannot be said that a web of policies, practices and actual physical barriers that preclude meaningful opportunities for the disabled to participate in civic life is related to an identifiable legitimate purpose or discrete objective. In fact, the converse is supported in the studies and reports that Congress considered, demonstrating that the overwhelming majority of state buildings were not accessible, and that a similar majority of officials contacted did not hire individuals with disabilities for no "purpose" other than to accommodate the fears, discomfort, and unfounded stereotypes articulated by co-workers. Congress reasonably could conclude that the states were broadly entangled in a status-based classification of disabled persons with no legitimate purpose, something the Equal Protection Clause does not permit.

Even under the appropriate analysis for a nonsuspect class, then, the pervasive condition of discriminatory state treatment of people with disabilities evidenced in their wholesale exclusion from employment and services solely due to their disabilities represents in many instances arbitrary and illegitimate discrimination that cannot withstand rational basis scrutiny.[37] "Congress considered and rejected the assumption

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[37] Certain state conduct towards individuals with disabilities, while not affecting a fundamental right, will receive more rigorous scrutiny than the rational review employed in reviewing, for example, the denial of state and federal benefits at issue in *Heller v. Doe*, 509 U.S. 312 (1993), or in most employment discrimination cases. For example, access to public education may not be a fundamental right, but "neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation." *Plyler v. Doe*, 457 U.S. 202, 221 (1982)

that the 'inferior economic and social status of disabled people...[was] an inevitable consequence of the physical and mental limitations imposed by disability,' instead attributing the inferior status to 'discriminatory policies based on unfounded, outmoded stereotypes and perceptions, and deeply imbedded prejudices toward people with disabilities.'" *Muller v. Costello*, 187 F.3d 298, 309 (2nd Cir. 1999) *quoting* H.R. Rep. No. 101-485(III), at 25 (1990), *reprinted in* 1990 U.S.C.C.A.N. 447-48. Congress had ample basis for the conclusion that the "inconsistent treatment of people with disabilities by different state or local government agencies is both inequitable and illogical." H.R. Rep. No. 101-485 (II), at 319. *See also* S. Rep. No. 116, 101st Cong., 1st Sess. 9, 18-19 (1989).

Finally, a more demanding standard of review is triggered when fundamental rights are implicated; in such cases the court examines legislation or other state conduct under the "strict scrutiny" standard. *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 670 (1966); *Zablocki v. Redhail*, 434 U.S. 374, 390-91 (1978) (right to marry); *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972) (prohibited sale of contraceptives to unmarried persons). In these cases, state conduct "will be sustained only if [it is] suitably tailored to serve a compelling state interest." *Cleburne* at 440. As evident in the discussion in section I.A of the brief, Congress was aware of significant unwarranted state incursions into

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(the undocumented status of the children did not establish a sufficient rational basis for denying the benefits that the state afforded other residents; and Texas' statute could not be sustained as furthering its interest in the preservation of the state's limited resources for the education of its lawful residents); *Brown v. Board of Education*, 347 U.S. 483, 493 (1954) ("[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.").

fundamental rights of the disabled.[38]

II. THE GOALS AND REQUIREMENTS OF THE ADA ARE CONSISTENT WITH ITS CENTRAL PURPOSE OF ERADICATING INTENTIONAL DISCRIMINATION, AND REPRESENT A PROPORTIONATE RESPONSE TO STATE-SPONSORED DISCRIMINATION.

The ADA provides a detailed map for charting the difference between rational and irrational discrimination. It covers only those individuals with a disability, a history of a disability, or those regarded as having a disability who can demonstrate that they are otherwise qualified for the essential functions of the job, with or without reasonable accommodations. 42 U.S.C. §§ 12102(2), 12111(8). As is the case under rational basis review, then, plaintiffs in ADA cases bear the burden of proving that they are "similarly

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[38] Restrictions or impediments imposed on the right to marry and to raise one's children, for example, merit strict scrutiny, which requires that the state justify the restriction by demonstrating its furtherance of a compelling state interest. *See, e.g., Loving v. Virginia,* 388 U.S. 1, 12 (1967); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (choices about marriage and upbringing of children are among rights ranked as of basic importance in our society and are sheltered by Fourteenth Amendment against State's unwarranted usurpation or disrespect). Restrictions on reproductive rights merit similar scrutiny. *Roe v. Wade*, 410 U.S. 113 (1973). Barriers to citizens' access to the ballot also receive strict scrutiny. *See generally Norman v. Reed*, 502 U.S. 279 (1992); *Illinois State Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173 (1979) (strict scrutiny afforded laws that impose ballot access requirements that single out unpopular political groups for exclusion); Those who are institutionalized or incarcerated have a constitutionally-protected right under the Fourteenth Amendment to necessary medical care and conditions of confinement that satisfy certain minimal standards. *Bell v. Wolfish*, 441 U.S. 520, 535 n.16, 545 (1979); *Youngberg v. Romeo*, 457 U.S. 307, 315-316 (1982).

situated" to those without disabilities as concerns the requirements or purposes of the job or program involved, or that they would be with a reasonable accommodation.

The ADA then focuses on intentional discrimination, and prohibits "discriminat[ion] against a qualified individual with a disability because of the disability of such individual." 42 U.S.C. § 12112(a). This includes, in part, limiting or segregating job applicants or employees, in a way that adversely affects their opportunities, simply on the basis of disability, or denying jobs or benefits to a qualified individual on the basis of that individual's association with an individual with a disability. 42 U.S.C. §§ 12112(b)(1), 12112(b)(4). The Equal Employment Opportunity Commission (EEOC) interprets this section to bar employers from "restricting the employment opportunities of qualified individuals with disabilities on the basis of stereotypes and myths about the individual's disability." EEOC, Interpretive Guidance on Title I of the ADA, 29 C.F.R. § 1630.5 Appendix. This is exactly what the Constitution also requires of states. Employers and other covered entities also are prohibited from contractual or other arrangements with those who engage in this or other forms of discrimination barred under the ADA. *See* 42 U.S.C. § 12112(b)(2). By its plain terms, these provisions target intentional, invidious discrimination.

It is difficult to theorize, for example, a legitimate governmental purpose served by a state's reliance on the sole factor of disability as dispositive in its treatment of certain applicants or employees with equivalent or superior skills when multiple factors typically influence employment decisions affecting others. This is all the more apparent in those cases when someone is refused or removed from employment solely because he or she associates with someone with a disability, or even has no disability at all but is "regarded as" having one. This is precisely the type of conduct resting on stereotype and "irrational prejudice" the Fourteenth Amendment will not countenance. *See City of*

Cleburne, 473 U.S. at 449-50.

The ADA is unlike other civil rights statutes because the nature of the discrimination it seeks to remedy is unique. In addition to the fear and stereotypes that are at the root of most discrimination, people with disabilities continually experience exclusion of a three-dimensional variety; they confront barriers that are physical as well as attitudinal. Addressing one type of barrier but not the other would not resolve the problem of unconstitutional discrimination. And with the invisibility and misunderstanding that is reinforced by keeping those with disabilities physically separate, fear and other irrational reactions will not disappear.

Titles I and II set forth essentially three types of accommodations: (1) reasonable modifications to rules, policies, and practices, (2) the removal of architectural, communication and transportation barriers, and (3) the provision of auxiliary aids. 42 U.S.C. § 12131(2). As with Section 504 of the Rehabilitation, "the goal [is to] eradicat[e] the 'invisibility of the handicapped." A & P Comm. Print 1990 (28A), at *490 (Committee report on Title II--Public Services) (quoting *ADAPT v. Skinner*, 881 F.2d 1184 (3rd Cir. 1989)).

The ADA's requirement of reasonable accommodations and modifications is essential to allow the integration of people with disabilities into the mainstream of society – the first step to ending discrimination. Without this remedy, the burden on the right of people with disabilities to compete for work and participate in programs and services for which they otherwise are qualified is more than incidental; the lack of accommodation makes the right impossible to exercise for millions of Americans. Reasonable accommodations are, after all, simply "insubstantial adjustments or modifications to existing programs, conditions, or facilities to permit handicapped individuals to surmount exclusionary barriers" Kenneth Allen Greene, *Burdens of Proving Handicap Discrimination Using Federal Employment Discrimination*

Law: Rational Basis or Undue Burden?, 1989 Det. C. L. Rev. 1053, 1065 (1989).

The claims concerning the ADA's imposed costs of "curtailing [the states'] traditional general regulatory power," *City of Boerne*, 521 U.S. at 534, are substantially overstated. Evidence presented to Congress during hearings on the ADA demonstrated that most individuals with disabilities who were unemployed typically could work with few, if any, accommodations, and that the costs associated with needed accommodations usually are nominal. *See* S. Rep. No. 101-116, at 10 (1989) (majority of employees will need no reasonable accommodation; many others can be accommodated for cost of less than $50); H.R. Rep. No. 101-485, II, at 33-34, *reprinted in* 1990 U.S.C.C.A.N. at 314-16 (accessible accommodations possible at little or no cost). Congressional committees also received testimony and reviewed reports "concluding that discrimination results in dependency on social welfare programs that cost the taxpayers unnecessary billions of dollars each year." A & P S. Rep. 101-116, at *16-*17. Subsequent cost/benefit analyses of reasonable accommodations in employment confirm that the cost of accommodations is far outweighed by the benefits to the state fisc that employment of qualified disabled individuals provides. *See, e.g.*, Peter David Blanck, *Communicating the Americans with Disabilities Act, Transcending Compliance: A Case Report on Sears, Roebuck and Co.* (The Annenberg Washington Program)(1994) (concluding that the average cost of most accommodations was $36, and that 69% of requested accommodations had no cost).

In any event, even assuming increased short-term costs related to compliance with reasonable accommodations and modifications requirements, any withdrawal of government involvement saves government funding; it is the means of saving money, and the classification that is the basis for it, that earns scrutiny under equal protection principles. Precisely this point is addressed in *Cleburne*. The Court discredited

rationales similar to the "intrusions" claimed in this case — litigation and related costs — as failing to explain why the mentally retarded were singled out. *Cleburne*, 473 U.S. at 449. It is likely that government policies refusing to modify bathroom facilities to accommodate female employees, or providing outdoor sanitary facilities only to female state highway workers, could over time afford the state comparable savings. It is unlikely that many, if any, state entities would pursue such cost-saving measures, just as it is unlikely that such inequities or interference with these workers' ability to maintain state employment would survive equal protection scrutiny. Here, however, disabled employees are being completely excluded from the workplace, not merely denied certain benefits or bathroom facilities. They are being subjected to a separate-but-unequal regime by the states that is the product of prejudice and stereotyping.

Integration of individuals with disabilities serves a critical long-term purpose beyond the more immediate one of inclusion for the individual seeking employment or program access. In *Olmstead v. L.C.*, 527 U.S. 581, 600 (1999), the Court recognized this purpose when addressing the rationales for community-based versus institutional placement and treatment of those with mental disabilities, pointing out that "institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life."[39] The states' past practices have created two separate societies, one for the able-bodied, and a hidden, constricted one for those with disabilities. The minimal cost and effort for states to integrate

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[39] In the context of the exclusion of racial minorities from juries, this Court observed that "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Batson v. Kentucky*, 476 U.S. 79, 87 (1986).

the disabled is essential to creation of a unified society in which misconceptions can fade and discriminatory reactions subside.

CONCLUSION

For the reasons set forth above, the decision of the Court of Appeals should be affirmed.

Respectfully Submitted,

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Dated: August 9, 2000

APPENDIX

Lambda Legal Defense and Education Fund, Inc. (Lambda) is a national non-profit public interest legal organization dedicated to the civil rights of lesbians, gay men and people with HIV/AIDS through impact litigation, education and public policy work. Founded in 1973, Lambda is the oldest and largest legal organization addressing these concerns. In 1983, Lambda filed the nation's first AIDS discrimination case. Lambda has appeared as counsel or *amicus curiae* in scores of cases in state and federal courts on behalf of people living with HIV or other disabilities, including, in part, *Albertsons, Inc. v. Hallie Kirkingburg*, 119 S. Ct. 2162 (1999); *Cleveland v. Policy Management Systems, Inc.*, 119 S. Ct. 1597 (1999); *Bragdon v. Abbott*, 118 S.Ct. 2196 (1998); *Doe & Smith v. Mutual of Omaha Insurance Co.*, 179 F.3d 557 (1999), *cert denied* 120 S.Ct. 845 (2000); *School Bd. for Nassau Cty. v. Arline*, 107 S. Ct. 1123 (1987); *Chalk v. U.S. District Court* 814 F.2d 701 (9th Cir. 1988); *Raytheon v. Fair Emp. & Housing Comm'n*, 212 Cal. App. 3d 1242 (1989); *McGann v. H&H Music Co.*, 946 F.2d 401 (5th Cir. 1991); *Gonzales v. Garner Food Services, Inc.*, 89 F.3d 1523 (11th Cir. 1996), *cert. denied, Wood v. Garner Food Services, Inc.*, 117 S.Ct. 1822 (1997); and *Mason Tenders Dist. Council Welfare Fund v. Donaghey*, Civ. Action No. 93-1154, 1993 WL 596313, 2 A.D. Cases 1745 (S.D.N.Y. Nov. 19, 1993). Lambda is particularly familiar with the unique barriers confronting persons with HIV and other stigmatized disabilities who attempt to secure access to government sponsored services and programs.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to preserving the principles of liberty and equality embodied in the Constitution. Since its founding in 1920, the ACLU has participated in numerous

cases before this Court. Through its AIDS Project and its state affiliates, the ACLU Foundation engages in extensive advocacy and litigation to protect people with disabilities from discrimination. The ACLU AIDS Project was also deeply involved in efforts to pass the ADA.

The Anti-Defamation League (ADL), one of the nation's oldest civil rights organizations, was founded in 1913 to promote good will among all races, ethnic groups, and religions. As set out in its charter, ADL's "ultimate purpose is to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens." Today, ADL remains committed to eradicating discrimination against *all* Americans. To this end, ADL has previously filed *amicus* briefs in discrimination cases heard by the U.S. Supreme Court and other courts, including *Brown v. Board of Education*, 347 U.S. 483 (1954) (opposing discrimination on the basis of race) and *Romer v. Evans*, 517 U.S. 620 (1996) (urging the rejection of an amendment to the Colorado State Constitution which would have precluded the government from preventing discrimination against homosexuals). ADL also believes that to secure fair treatment for all, the federal government must be able to invoke fully its constitutional powers to enact needed civil rights legislation. Therefore, ADL has filed *amicus* briefs before this Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997) (supporting the Religious Freedom Restoration Act) and *United States v. Morrison*, 120 S. Ct. 1740 (2000) (arguing that the U.S. Congress had the power to enact the Violence Against Woman Act's civil-remedy provision).

The California Women's Law Center (CWLC) is a private, nonprofit public interest law center specializing in the civil rights of women and girls. The California Women's Law Center, established in 1989, works in the following priority areas: Sex Discrimination in education and employment,

Women's Health and Reproductive Rights, Family Law, Violence Against Women and Child Care. Since its inception, the CWLC has placed a strong emphasis on advancing the rights of women in employment. The CWLC has initiated the Breast Cancer Legal Project to provide advocacy and legal advice to breast cancer survivors and to address the systemic barriers that prevent women from accessing the health care, and workplace issues related to discrimination, reasonable accommodations and medical leave issues. CWLC's work has focused particularly on the issues of discrimination related to sexual harassment, sex discrimination, disability discrimination related to breast cancer, the intersection of race and gender discrimination, equal access and opportunities, and the right to redress a claim. The issue raised in this case has an enormous impact on the rights of women and girls to be free of the terrible consequences of discrimination and harassment.

Center for Women Policy Studies is an independent, national, multiethnic and multicultural feminist policy research and advocacy institution, founded in 1972. Since our founding, we have recognized and addressed the combined impact of sexism and disability stigma that disabled women, including women with HIV/AIDS, confront in the exercise of their full citizenship. We currently are working with a network of state legislators to ensure disabled women have full and equal protection from violence and discrimination under both federal and state law. The Court's decision in this case will have a significant impact on our work to eliminate discrimination in delivery of social services and access to state jobs, and end violations of disabled women's reproductive rights and parental rights.

The Friends Committee on National Legislation (FCNL) is a Quaker lobby in the public interest. Founded in 1943, FCNL works for social equity, economic justice, peace, and good government. FCNL's legislative policy grows out

of a fundamental belief that there is that of God in every human being and that God's love endows all creation with worth and dignity. FCNL believes that all persons should be accepted on their merits and are equally deserving of a life with dignity. We also recognize that meaningful work contributes to the development of human potential and self-esteem, as well as to community well-being. For all these reasons, FCNL supported passage of the Americans with Disabilities Act (ADA), supports vigorous enforcement of the (ADA), and opposes unjust discrimination on the basis of disability. We join this brief as part of our continued commitment to those who are disabled and differently-abled.

Gay and Lesbian Advocates and Defenders (GLAD) is a nonprofit public interest law firm, headquartered in Boston, Massachusetts and serving the six New England states. GLAD's mission is to protect and enhance the rights of lesbians, gay men, bisexuals, and people living with HIV through litigation, education and advocacy.

The Human Rights Campaign (HRC) is the nation's largest gay and lesbian civil rights organization, with over 360,000 members nationwide. HRC is devoted to fighting and ending discrimination on the basis of sexual orientation, and to protecting the basic civil and human rights of gay, lesbian, and bisexual Americans. To this end, HRC has provided federal and state legislative, regulatory and judicial advocacy, media and grassroots support on a range of initiatives affecting gay, lesbian and bisexual individuals who suffer discrimination on the basis of their sexual orientation, including the Employment Non-Discrimination Act.

The National Asian Pacific American Legal Consortium (the Consortium) is anonprofit, nonpartisan organization based in Washington D.C. whose missionis to advance the legal and civil rights of Asian Pacific Americans.

The Consortium was established in 1991 by its Affiliates, the Asian Law Caucus, the Asian Pacific American Legal Center of Southern California and the Asian American Legal Defense and Education Fund. The Consortium gives voice to Asian Pacific American civil rights concerns on hate crimes, affirmative action, immigration and immigrant rights, voting rights, census issues, language rights and community empowerment through advocacy, community education, public policy development and litigation. The Consortium has an interest in this case because it implicates the civil rights of the disabled, who like minority groups, face discriminatory barriers too, among other things, educational and employment opportunities.

The National Council of Jewish Women (NCJW), Inc. is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy and community service to improve the quality of life for women, children and families and strives to ensure individual rights and freedoms for all. Founded in 1893, the National Council of Jewish Women has 90,000 members in over 500 communities nationwide. Given NCJW's historical commitment to civil rights issues and active involvement in passage of the Americans With Disabilities Act, we join this brief.

Founded in 1973, the National Gay and Lesbian Task Force (NGLTF) has worked to eliminate prejudice, violence and injustice against gay, lesbian, bisexual and transgendered people at the local, state and national level. As part of a broader social justice movement for freedom, justice and equality, NGLTF is creating a world that respects and celebrates the diversity of human expression and identity where all people may fully participate in society.

The National Partnership for Women & Families is a

national advocacy organization that develops and promotes policies to help women achieve equal opportunity, access to quality healthcare, and economic security for themselves and their families. Since its founding in 1971 as the Women's Legal Defense Fund, the National Partnership has worked to advance the rights of women and families through litigation of significant cases, public education, and lobbying efforts. The National Partnership participated as *amicus curiae* in several federal circuit court appeals on a question closely related to the question presented in the present case, to wit: whether state employees can enjoy the protections of the Family and Medical Leave Act.

The National Urban League, under the leadership of Hugh B. Price, has sought to emphasize greater reliance on the unique resources and strengths of the African-American community to find solutions to its own problems. To accomplish this, the League's approach has been to utilize fully the tools of advocacy, research, program service and systems change. The result has been an organization with strong roots in the community, focused on the social and educational development of youth, economic self-sufficiency and racial inclusion. The National Urban League, through its affiliate system, serves more than 2 million individuals each year. The League views with concern any potential diminution of the civil rights of disabled persons.

The National Women's Law Center (NWLC) is non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity for women in educations, the workplace, and other settings, including through litigation of cases brought under federal anti-discrimination laws. The Center has a deep and abiding interest in ensuring that these laws are

fully implemented and enforced, and has not only private actors and the federal government, but also the states, are held tot he standards of these laws.

The National Youth Advocacy Coalition (NYAC) is the only national organization focused solely on improving the lives of lesbian, gay, bisexual and transgender (LGBT) youth through advocacy, education, and information.

The Northwest Women's Law Center (NWLC) is a non-profit public interest organization that works to advance the legal rights of all women through litigation, education, legislation and the provisions of legal information and referral services. Since it's founding in 1978, the NWLC has been dedicated to protecting and securing equal rights for lesbians and their families, and advocating on behalf of those with differing abilities. The Law Center has long focused on the threats to equality based on sexual orientation and disabilities. Toward these ends, the NWLC has participated as counsel and as amicus curiae in cases throughout the Northwest, and the country and is currently involved in numerous legislative and litigation efforts. The NWLC continues to serve as a regional expert and leading advocate on these issues.

NOW Legal Defense and Education Fund (NOW Legal Defense) is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. A major goal of NOW Legal Defense is the elimination of barriers that deny women economic opportunities, such as employment discrimination. In furtherance of that goal, NOW Legal Defense litigates cases to secure full enforcement of laws prohibiting employment discrimination, including *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998) and *Bowman v. Heller*, 420 Mass. 517 (Ma. 1995), cert. denied, 516 U.S.

1032 (1995). NOW Legal Defense participated as amicus in *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998), *Oncale v. Sundowner Offshore Services*, 118 S. Ct. 998 (1998), *Harris v. Forklift Sys. Inc.*, 510 U.S. 17 (1993), and *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994). NOW Legal Defense has also litigated cases addressing Congress's Section 5 authority to enact remedial legislation to address harms of constitutional proportion. See U.S. v. Morrison, 120 S. Ct. 1740 (2000).

People for the American Way Foundation (People For) is a nonpartisan, education-orientated citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty. People For now has over 300,000 members nationwide. People For has been actively involved in litigation and other efforts to combat discrimination, including discrimination by state government agencies. People For has supported the Americans with Disabilities Act, and joins this brief to help vindicate the important principles at stake in this case concerning the Act.

Women Employed is a national association of working women based in Chicago, with a membership of 2000. Since 1973, the organization has assisted thousands of working women with problems of sex discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts. Women Employed strongly believes that discrimination against disabled employees is a civil rights violation that must be remedied as it is a barrier to achieving equal opportunity and economic equity for employees in the workplace.

The Women's Law Project (WLP) is a non-profit

public interest legal advocacy organization located in Philadelphia, Pennsylvania. Founded in 1974, WLP works to abolish discrimination and injustice in our laws and institutions and to advance the legal and economic status of women and their families through litigation, public policy development, public education, and individual counseling. WLP is committed to safeguarding the rights of women who experience invidious discrimination on any basis. To that end, WLP has a strong interest in defending the validity of our anti-discrimination laws as applied to all perpetrators of discrimination

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No. 99-1240

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THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA AND THE ALABAMA DEPARTMENT OF YOUTH SERVICES,
Petitioners,

v.

PATRICIA GARRETT AND MILTON ASH,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS AND UNITED CEREBRAL PALSY ASSOCIATIONS, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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IN THE

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No. 99-1240

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA AND THE ALABAMA DEPARTMENT OF YOUTH SERVICES,

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v.

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BRIEF FOR THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS AND UNITED CEREBRAL PALSY ASSOCIATIONS, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*[1]

Amicus National Association of Protection and Advocacy Systems (NAPAS), founded in 1981, is the membership organization for the nationwide system of protection and advocacy (P&A) agencies. Located in all 50 States, the District of Columbia, Puerto Rico, and the territories (the

[1] No counsel for any party authored this brief either in whole or in part, and no persons other than the *amici curiae* and their counsel made any monetary contribution to its preparation or submission. The parties' written consents to the filing of this brief have been filed with the Clerk of the Court.

Virgin Islands, Guam, American Samoa, and the Northern Marianas Islands), P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all people with disabilities in a variety of settings. The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities. P&As are particularly active in providing assistance to persons with disabilities under the Americans with Disabilities Act ("ADA"). In fiscal year 1999 alone, P&As served well over 800,000 persons with disabilities through individual case representation, systemic advocacy, information and referral, and education and training.

Because of its national P&A membership and familiarity with the protections afforded by each State to persons with disabilities, NAPAS has firsthand knowledge of the state laws and how they operate in practice. NAPAS is thus uniquely suited to assist the Court in evaluating petitioners' arguments that Congress did not have authority under the Fourteenth Amendment to apply the ADA to the States because state laws were sufficient in 1990 (and are sufficient today) to prevent discrimination against persons with disabilities.

Amicus United Cerebral Palsy Associations, Inc. ("UCP"), is a Washington, D.C.-based non-for-profit corporation incorporated in 1948. The mission of UCP is to advance the independence, productivity and full citizenship of people with cerebral palsy and other disabilities, through its commitment to the principles of independence, inclusion and self-determination. UCP is the leading source of information on cerebral palsy and is a pivotal advocate for the rights of all people with disabilities. UCP and its nationwide network of 135 affiliates in 39 states strive to ensure the inclusion of persons with disabilities in every facet of society - from the web to the workplace, from the classroom to the community. The UCP family serves 30,000 children and adults with disabilities a day, or over 1,000,000 individuals each year.

UCP has a long-standing history of legal activism on behalf of the individuals with disabilities who are served by the UCP affiliate system. Given UCP's national presence and active work in most States, it is familiar with the state laws and how they operate in practice and, indeed, monitors and tracks the state laws for its affiliates.

INTRODUCTION AND SUMMARY

In enacting the ADA, Congress found that "discrimination against individuals with disabilities continue[s] to be a serious and pervasive social problem." 42 § 12101(a)(2). Such discrimination "persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." *Id.* § 12101(a)(3). And it persists in significant measure because the estimated "43,000,000 Americans" with disabilities "have often had no legal recourse to redress such discrimination." *Id.* § 12101(a)(1), (4). As a result, Congress concluded (*id.* § 12101(a)(9)) that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis" – a right guaranteed to all Americans under the Fourteenth Amendment to the United States Constitution.

Petitioners maintain, however, that Congress failed to identify any "pattern and practice of State equal-protection violations" in "alleged employment or public-access discrimination by State governments." Pet. Br. 4. Prior to the passage of the ADA, they claim, all "50 states" had passed "disability-discrimination law[s] applicable to public and private employers." *Id.* at 6-7. And today, petitioners continue, States "markedly overprotect . . . the constitutional rights of the disabled" (*id.* at 4) because "all 50 states have comprehensive measures guaranteeing the disabled access to public services and places" that in some cases exceed the relief afforded by the ADA. *Id.* at 6-7. In support of these

claims, petitioners have attached as Appendix A to their brief a list of the relevant state statutes that purportedly demonstrate this comprehensive state law protection for persons with disabilities.

These claims, on their face, are difficult to reconcile with the language and history of the ADA. It is hard to believe, for example, that if the 50 state legislatures had adequately addressed the problem of discrimination against individuals with disabilities, the "Fifty State Governors' committees" on whose reports Congress relied would have concluded that "existing State laws do not adequately counter such acts of discrimination."[2] And petitioners' glowing account of state law conflicts sharply with the conclusions of a bipartisan commission of predominantly state and local government officials, who reported in 1989 that irrational prejudice against persons with disabilities continued to lead numerous state and local officials throughout the country to deny employment to persons with disabilities.[3] Indeed, one must ask whether the ADA could have garnered such an overwhelming level of bipartisan and inter-governmental support – unprecedented for major civil rights legislation – had States already solved the problem.

They had not. A review of petitioners' Appendix A confirms that petitioners have greatly exaggerated the extent

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[2] *See, e.g.*, S. Rep. No. 101-116, at 18 (1989) ("S. Rep.").

[3] Advisory Comm'n on Intergovernmental Relations, *Disability Rights Mandates: Federal and State Compliance With Employment Protections and Architectural Barrier Removal*, at 72-73 (April 1989) ("state officials" and "representatives of state advocacy groups" identified "the significant and often negative impact of public and employer attitudes toward persons with disabilities" as a serious impediment to the employment of persons with disabilities "in state government"); *see also id.* at 73 ("Such attitudes have multiple dimensions, including feelings of discomfort in associating with disabled individuals, inaccurate assessments of their productivity, and concerns about the costs that might be associated with work place accommodations").

of state law protection for individuals with disabilities against invidious discrimination in 1990 and today. In reality, state law in 1990 reflected a patchwork of inconsistent coverage and remedies, often seriously limiting the ability of many persons with disabilities to gain redress for discrimination, and excluding some persons with disabilities from protection altogether. The specific ways in which petitioners' Appendix A overstates petitioners' case are summarized in the Appendix attached to this brief. For each State, the Appendix reproduces verbatim, in the left two columns, the information that petitioners provided in their Appendix A. In the right-hand column, labeled "comments," *amici* note specific limitations on the nature or scope of the coverage actually afforded by the provisions petitioners cite.

This analysis confirms that Congress acted well within the limits of its power to enforce the Fourteenth Amendment when it enacted the ADA. First, Congress was plainly responding to a massive denial of the right to equal protection of the laws that was limited neither to certain geographic areas nor to the private sector. Congress was well aware that discrimination against individuals with disabilities is rooted in pernicious myths and stereotypes to which state officials – like any other citizens – are not immune. And Congress expressly found that discrimination against persons with disabilities is a persistent, pervasive, societal problem that burdens the ability of a discrete class of Americans to participate equally in all aspects of public life – including numerous areas in which the States are heavily or predominantly involved. These findings, and the legislative record that supports them, amply demonstrate that Congress passed the ADA in response to a problem of constitutional dimensions.

Second, Congress acted within its "wide latitude" to remedy and deter violations of equal protection when it crafted the ADA. *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997). In responding to constitutional violations, Congress

may prohibit "a somewhat broader swath of conduct" than is forbidden by the Fourteenth Amendment. *Kimel* v. *Florida Bd. of Regents*, 120 S.Ct. 631, 644 (2000). Where, as here, "the evil presented" is serious and pervasive, Congress is fully empowered to take "[s]trong measures" to address it. *City of Boerne*, 521 U.S. at 530.

That Congress chose means well-suited to its purposes is borne out, in particular, by an analysis of the gaps and defects in state law at the time the ADA was passed. For example, in 1990, many States failed to provide coverage to all members of the discrete class of persons with disabilities that Congress found had been "subjected to a history of purposeful unequal treatment." 42 U.S.C. § 12101(a)(7). People with mental impairments, for example, such as mental illness or mental retardation, had no legal recourse against discrimination whatsoever under the laws of many States.

Where state laws did address discrimination, they often did so in ways that denied individuals with disabilities an effective remedy. For example, many States did not require employers to provide reasonable accommodation to persons with disabilities, thereby effectively allowing the fact of an individual's disability to excuse invidious discrimination. Similarly, many state remedial schemes lacked adequate provisions for recovery of damages, rendering them ineffective as both a remedy and a deterrent to discrimination. And many States had not begun to adapt their laws to address the unnecessary and inappropriate institutionalization of many Americans whose needs were better served in less restrictive environments. In each of these areas, the ADA implemented balanced and proven measures that appropriately responded to the history of unconstitutional discrimination and the failure of state laws to remedy or deter this discrimination. As national legislation, the ADA ensures that persons with disabilities have consistent protection from invidious discrimination no matter where they live or where they travel.

Finally, petitioners understate what is at stake in this case by overstating the degree to which state law today mirrors the protection of the ADA. Many States still fail to provide remedies comparable to those offered by the ADA, and thus would fail, standing alone, to deter invidious discrimination. And since some States are prepared to follow this attack on the ADA with a challenge to Congress's power under the Commerce Clause to enact all of Title II, the stakes here are very high indeed. Thus, not only was Congress acting within its enforcement power under the Fourteenth Amendment when it enacted the ADA, but the continuing vitality of the ADA remains vital to secure the guarantee of equal protection for all Americans.

ARGUMENT

I. CONGRESS ACTED WITHIN ITS SECTION 5 AUTHORITY IN ENACTING THE ADA.

A. Congress Has Wide Latitude In Enacting Legislation To Deter And Remedy State Violations Of Equal Protection.

Section 1 of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Section 5 of the Fourteenth Amendment provides: "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Section 5 is "'a positive grant of legislative power' to Congress." *City of Boerne* v. *Flores*, 521 U.S. 507, 517 (1997) (quoting *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966). This Court consistently has defined Congress's Section 5 power in "broad" terms. *Id.* at 517, 536; see *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976) ("When Congress acts pursuant to § 5 . . . it exercis[es] legislative

authority that is plenary within the terms of the constitutional grant").

When addressing whether Congress has acted within this broad grant of authority, the Court typically addresses two issues. First, the Court considers whether Congress was legislating in response to "conduct transgressing the Fourteenth Amendment's substantive provisions." *Florida Prepaid Postsecondary Ed. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 639 (1999). As the Court explained in *City of Boerne*, Congress does not have power to "decree the substance of the Fourteenth Amendment's restrictions"; it may enforce that amendment, but it cannot "chang[e] what the right is." 521 U.S. at 519. Defining the scope of the rights protected under the Fourteenth Amendment is, of course, the province of this Court.

Second, the Court addresses whether, in responding to a violation of the Fourteenth Amendment, there is "congruence and proportionality" between the violation and the remedy. *City of Boerne*, 521 U.S. at 520. In contrast to the first inquiry, the question of "'what legislation is needed to secure the guarantees of the Fourteenth Amendment'" is a matter chiefly committed to Congress, and for that reason "its conclusions are entitled to much deference." *Id.* at 536 (quoting *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966); see *Kimel* v. *Florida Bd. of Regents*, 120 S. Ct. 631, 644 (2000) (same).[4] Thus, Congress has broad leeway in fashioning legislative responses to constitutional violations.

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[4] *See also Ex Parte Virginia*, 100 U.S. 339, 345-46 (1879):

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

For example, in responding to a violation of the Fourteenth Amendment, Congress "is not confined" to legislation that is tailored to address only the unconstitutional conduct. *Kimel*, 120 S. Ct. at 644. "Rather, Congress' power 'to enforce' the Amendment includes the authority both to remedy *and to deter* violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Id.* (emphasis added) (citations omitted). Of course, at some point Congress's remedial and prophylactic legislation could sweep so far beyond the violation as to cross the line that separates valid enforcement action from "a substantive redefinition of the Fourteenth Amendment right at issue." *Id.* But because "Congress must have wide latitude in determining where [that line] lies," the Court's review is limited to a deferential assessment of whether there is "'a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Id.* (quoting *City of Boerne*, 521 U.S. at 520).

B. Congress Responded To Extraordinary Evidence Of Invidious Discrimination Against Persons With Disabilities, Including Discrimination By State Actors.

In asserting that Congress was not responding to a record of on-going and substantial violations of the right to equal protection, petitioners face an uphill battle. They must confront, first and foremost, the explicit findings in section 12101 of pervasive constitutional violations on which Congress expressly premised the ADA. For example, Congress found that discrimination against persons with disabilities

- "continue[s] to be a serious and pervasive social problem" (42 U.S.C. § 12101(a)(2));

- "persists in [numerous] critical areas" (*id.* § 12101(a)(3));

- affects individuals who "have often had no legal recourse" (*id.* § 12101(a)(4));

- is "continually encounter[ed in] various forms . . . including outright intentional exclusion" (*id.* § 12101(a)(5));

- "result[s] from stereotypic assumptions not truly indicative of the individual ability of such individuals" (*id.* § 12101(a)(7)); and

- "denies people with disabilities the opportunity to compete on an equal basis" (*id.* § 12101(a)(9)).

These codified findings of continuing discrimination capture the essence of what this Court has consistently defined as the violation of the Fourteenth Amendment right to the equal protection of the laws. It is difficult to imagine how Congress could have more directly and expressly identified a pattern of conduct denying persons the right to equal protection than it did in the ADA.

There is certainly no support for petitioners' contention that these explicit findings can support legislation against discrimination only in the private sector. To the contrary, many of the "critical areas" in which Congress expressly found discrimination to be "pervasive" – such as "employment, . . . education, . . . institutionalization, . . . voting, and access to public services" (*id.* § 12101(a)(3)) are areas in which state governments play at least a central if not dominant role. There is no private sector limitation to these arenas. Moreover, the underlying cause of the ongoing discrimination that Congress identified – the persistence of "stereotypic assumptions not truly indicative" of individual ability (*id.* § 12101(a)(7)) – applies as fully to individuals in public agencies as it does to those in the private sector. Thus, Congress's findings – both as to cause and effect – fully support its decision to extend the full protection of the ADA to those facing discrimination from state officials as well as from private actors.

The legislative record against which Congress made these findings amply supports them. As the briefs of respondents and other amici set forth in detail, Congress acted against a massive record of virulent discrimination – both historic and contemporary – that included discrimination by state and local agencies throughout the nation. These briefs further describe how the judicial record – which also serves as the basis for Congressional action – provides further confirmation that state and federal law had proven ineffective to deter state actors from discriminating against individuals with disabilities. As we show in Part I.C, the inability of state law to deter and remedy discrimination against persons with disabilities is not surprising – state law fell far short of providing the consistent coverage and meaningful remedies that Congress mandated in the ADA.

The findings and record here thus stand in stark contrast to those involving the Age Discrimination in Employment Act (ADEA) and the Religious Freedom Restoration Act (RFRA), on which petitioners heavily rely. For example, in the ADA, Congress extended protection only to a discrete class of persons who have been "subjected to a history of purposeful unequal treatment," whereas in the ADEA, Congress acted to protect a class to which "all persons" would eventually belong, and which has "not been subjected" to such a history of unequal treatment. *Kimel*, 120 S. Ct. at 645 (internal quotation omitted). Similarly, the record supporting the ADA is light-years removed from that supporting RFRA, where "[t]he history of persecution in this country detailed in the hearings mention[ed] no episodes occurring in the past 40 years." *City of Boerne*, 521 U.S. at 530. Thus, with respect to discrimination against persons with disabilities, Congress sought – and was amply justified, as a factual matter, in seeking – to remedy on-going discrimination on the part of the States.

C. The ADA Is A Congruent and Proportional Response To The States' Constitutional Violations, Which State Laws Failed To Address.

In responding to the fact of pervasive discrimination against individuals with disabilities, in both the public and private sectors, Congress crafted a statute that is congruent and proportional to the constitutional violations it found. That is true with respect to the way Congress defined the covered class, the prohibited conduct, and the available remedies.

In defining the class of persons with a disability, Congress drew on the Rehabilitation Act's definition of "handicapped individual," which this Court had previously recognized was an important and comprehensive means of combating societal discrimination against persons with disabilities. See, *e.g.*, 42 U.S.C. § 12102(2); *School Bd.* v. *Arline*, 480 U.S. 273, 281-86 (1987). And in devising a remedial scheme, Congress borrowed from the Rehabilitation Act as well as from the enforcement provisions for Title VII of the Civil Rights Act. See, *e.g.*, 42 U.S.C. § 12117 (incorporating into Title I of the ADA various "powers, remedies, and procedures" of Title VII); *id.* § 12133 (incorporating into Title II of the ADA various "remedies, procedures, and rights" set forth in Section 504 of the Rehabilitation Act). Because Congress found that the scope of "the evil presented" was vast, it reasonably concluded that "clear, strong, consistent, enforceable standards" (*id.* § 12101(b)(2)) comparable to those used to combat other forms of discrimination were needed here as well.

In concluding that national standards were needed to complement existing state law remedies, Congress was also aware of the inadequacy of existing state laws. The Senate Report observes, for example, that "State laws are inadequate to address the pervasive problems of discrimination that people with disabilities are facing." S. Rep. at 18. The Senate Report also notes that the "fifty State Governors' Committees, with whom the President's Committee works,

report that existing State laws do not adequately counter such acts of discrimination." *Id.* Congressional testimony further supported these findings. See, *e.g.*, *Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong. 299, 334 (1989) (statement of Arlene B. Mayerson) ("While 44 states have passed laws prohibiting employment discrimination against persons with disabilities, only twelve are comparable to the Rehabilitation Act in providing protections against discriminatory practices"); *id.* at 335 ("[M]any state statutes have very restrictive definitions of 'handicap.'"); *id.* at 336 ("[N]early one-half of the states do not require any reasonable accommodation" and of those that do, "several define the term restrictively").[5]

Because petitioners have challenged these congressional findings, however, it is useful to examine more closely the level of protection that state law actually provided in 1990. Such a review confirms that – by comparison with the ADA – state law was plagued by gaps in coverage and remedies that are more than sufficient to explain the continuing failure of state law to deter discrimination against persons with disabilities in both the public and private sectors, and to justify the particular legislative measures that Congress took.

1. Coverage

Congress had to define the class of persons eligible for the protection it provided, and it did so in a way that was entirely commensurate with the record of discrimination that it sought to address. Congress adopted a definition that afforded protection to many individuals with disabilities that the States had failed to cover.

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[5] *See also* J. Flaccus, *Handicap Discrimination Legislation: With Such Inadequate Coverage at the Federal Level, Can State Legislation Be of Any Help?*, 40 Ark. L. Rev. 185, 261 (1986) (summarizing limits of state law protection) (cited in testimony of Arlene B. Mayerson).

Specifically, Congress adopted a functional definition of disability. Under the ADA:

> The term 'disability' means, with respect to an individual –
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). By defining disability in this functional manner, Congress ensured that no individual with a significant impairment likely to give rise to discrimination would be excluded from coverage under the ADA. In this respect, Congress responded to significant areas of discrimination that state laws failed to cover.

For example, many States wholly excluded people with mental impairments from any protection against discrimination on that basis. In 1990, 12 States did not cover people with mental illness,[6] and 7 States did not cover people with mental retardation.[7] Thus, in these jurisdictions, individuals who Congress found to have been subject to a

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[6] *See* Ala. Code § 21-7-8 (1990); Ariz. Rev. Stat. Ann. § 41-1461(4) (West 1990); Cal. Gov't Code § 12926(h) (West 1990); Colo. Rev. Stat. Ann. § 24-34-402(1)(a) (West 1990), *cf. AT&T Techs., Inc.* v. *Royston*, 772 P.2d (Colo. Ct. App. 1989); Ga. Code Ann. § 34-6A-2(7)(B) (1990); Kan. Stat. Ann. § 44-1002 (1990); Ky. Rev. Stat. Ann. § 207.130 (1990); La. Rev. Stat. Ann. § 46:2253 (West 1990); Mich. Comp. Laws § 37.1103 (1990); Miss. Code Ann. § 43-6-15 (1990); Nev. Rev. Stat. §§ 281.370, 613.330 (1990); N.H. Rev. Stat. Ann. § 354-A:3 (1990).

[7] *See* Ala. Code § 21-7-8 (1990); Ariz. Rev. Stat. Ann. § 41-1461(4) (West 1990); Colo. Rev. Stat. Ann. § 24-34-402(1)(a) (West 1990), *cf. AT&T Techs., Inc.* v. *Royston*, 772 P.2d (Colo. Ct. App. 1989); Kan. Stat. Ann. § 44-1002 (1990); Ky. Rev. Stat. Ann. § 207.130 (Michie 1990); Miss. Code Ann. § 43-6-15 (1990); Nev. Rev. Stat. §§ 281.370, 613.330 (1990).

long history of discriminatory treatment[8] were denied access to the remedies that the State offered to those who could show a different type of impairment. Moreover, one jurisdiction limited the coverage even of those with physical disabilities by excluding all persons with communicable diseases.[9] Arkansas did not prohibit employment discrimination against the disabled at all in 1990.

Similarly, in borrowing its definition of disability from the Rehabilitation Act, Congress included not only those individuals with a physical or mental impairment that currently operated to substantially limit a major life activity, but those who had a "record of" or who were "regarded as" having such an impairment. 42 U.S.C. § 12102(2).

The importance of these definitions cannot be gainsaid. This Court relied on the complainant's "record of" impairment in concluding that an elementary school teacher had a cause of action under the Rehabilitation Act against the local public school board for irrational discrimination based on a past impairment (tuberculosis). *Arline*, 480 U.S. at 281. Congress specifically included in the ADA's coverage individuals who have a "record of" impairment in order to protect "individuals who have recovered from a physical or mental impairment which previously substantially limited them, in a major life activity." S. Rep. at 23. Congress cited as frequently occurring examples of this group individuals with histories of mental or emotional illness, heart disease or cancer, and individuals who have been misclassified as mentally retarded. *Id.*

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[8] 42 U.S.C. § 12101(a) (citing to pervasive history of discrimination suffered by persons with "physical *or mental* disabilities") (emphasis added); *see also City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 461-65 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part) (detailing history of invidious discrimination against the mentally retarded).

[9] Ky. Rev. Stat. Ann. § 207.140(2)(c) (Michie 1990).

As for the "regarded as" prong, Congress first recognized its importance when it amended the Rehabilitation Act in 1974 to include such coverage. As this Court observed, this amendment reflected Congress's "acknowledge[ment] that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." *Arline*, 480 U.S. at 284.

And indeed, the legislative history of the ADA confirms that many of those most vulnerable to irrational and invidious discrimination on the basis of misperceptions of disability would lack a remedy absent coverage under the "regarded as" definition. Congress sought to protect "individuals who have impairments that do not in fact substantially limit their functioning" but that may give rise to "negative attitudes" in others, such as burn victims, or individuals with medical conditions that are under control, such as diabetes, high blood pressure, or epilepsy. S. Rep. at 23-24; *see Sutton* v. *United Air Lines*, 527 U.S. 471, 488 (1999).

Nevertheless, in 1990 – 15 years after the Rehabilitation Act amendments and 3 years after *Arline* – 17 States did not protect those who had a record of disability,[10] and 22 States did not protect those who were regarded as having a disability.[11] One State even affirmatively excluded persons

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[10] *See* Ala. Code § 21-7-8 (1990); Ariz. Rev. Stat. Ann. § 41-1461(4) (West 1990); Cal. Gov't Code § 12926(h) (1990); Ind. Code Ann. § 22-9-1-3(r) (West 1990); Iowa Code Ann. § 216.2 (West 1990); Kan. Stat. Ann. § 44-1002 (1990); Ky. Rev. Stat. Ann. § 207.130 (Michie 1990); Me. Rev. Stat. Ann. tit. 5, § 4553 (West 1990); Md. Ann. Code art. 49B, § 15(g) (1990); Miss. Code Ann. § 43-6-15 (1990); Mont. Code Ann. §§ 49-2-101, 49-3-101, 39-30-103 (1990); Neb. Rev. Stat. § 48-1102 (1990); Nev. Rev. Stat. §§ 281.370, 613.330 (1990); N.H. Rev. Stat. Ann. § 354-A:3 (1990); N.Y. Exec. Law § 292(21)(a) (McKinney 1990); Tenn. Code Ann. § 8-50-103 (1990); Utah Code Ann. § 34-35-2(9) (1990).

[11] *See* Ala. Code § 21-7-8 (1990); Ariz. Rev. Stat. Ann. § 41-1461(4) (West 1990); Cal. Gov't Code § 12926(h) (1990); Conn. Gen. Stat. Ann. § 462-60(a)(1) (West 1990); Ga. Code Ann. § 34-6A-2(3) (1990); Ind.

with any "cosmetic disfigurement" from protection against discrimination.[12] The ADA directly protects all these individuals from discrimination.

At the same time, as this Court has held, the ADA does not sweep so broadly in its coverage as to include, for example, those individuals with an impairment, such as myopia, that is correctable and that, in its corrected state, does not substantially limit a major life activity. See *Sutton*, 527 U.S. at 471. By covering only "a confined, and historically disadvantaged, class," (*id.* at 495) (Ginsburg, J., concurring), and not extending protection to every individual who could claim any sort of impairment, the ADA is appropriately tailored to extend only to the discrete class of persons who have been subjected to denials of their right to equal treatment under the law.

2. Reasonable Accommodation

The ADA's broad requirement of reasonable accommodation likewise is a congruent and proportional response to discrimination against persons with disabilities that many States failed to deter. "Discrimination" under the ADA includes:

> not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or

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Code Ann. § 22-9-1-3(r) (West 1990); Iowa Code Ann. § 216.2 (West 1990); Kan. Stat. Ann. § 44-1002 (1990); Ky. Rev. Stat. Ann. § 207.130 (Michie 1990); Me. Rev. Stat. Ann. tit. 5, § 4553 (1990); Md. Ann. Code art. 49B, § 15(g) (1990); Mich. Comp. Laws § 37.1103 (1990); Miss. Code Ann. § 43-6-15 (1990); Mont. Code Ann. §§ 49-2-101, 49-3-101, 39-30-103 (1990); Neb. Rev. Stat. § 48-1102 (1990); Nev. Rev. Stat. §§ 281.370, 613.330 (1990); N.H. Rev. Stat. Ann. § 354-A:3 (1990); N.Y. Exec. Law § 292(21)(a) (McKinney 1990); Tenn. Code Ann. § 8-50-103 (1990); Tex. Lab. Code Ann. § 21.051 (West 1990); Utah Code Ann. § 34-35-2(9) (1990); Va. Code Ann. § 51.5-3 (Michie 1990).

[12] *See* La. Rev. Stat. Ann. § 46:2253 (West 1990).

> employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.

42 U.S.C. § 12112(b)(5)(A). This uniform national requirement was necessary to remedy and deter discrimination because 15 States wholly lacked reasonable accommodation requirements,[13] and additional States limited their reasonable accommodation requirements so as to render them virtually meaningless.[14] See S. Rep. at 9 ("[T]he major categories of job discrimination faced by people with disabilities include . . . failure to provide or make available reasonable accommodations").

Reasonable accommodation requirements can often be a critical remedy for individuals with disabilities. That is because, in the absence of a requirement, it is all too easy for an employer to point to a supposed concern about the cost of making any accommodation for a person with disabilities, and to use that unexamined concern as an excuse to justify what is in reality a decision motivated by prejudice against a person

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[13] *See* Ala. Admin. Code r. 670-x-4-.03 (1990); Ala. Code § 21-7-8 (1990); Ark. Code contained no prohibition of employment discrimination against the disabled in 1990; Fla. Stat. ch. 760.10 (1990); Ga. Code Ann. § 34-6A-4(a) (1990); Haw. Rev. Stat. Ann. § 378-3(3) (Michie 1990); Ind. Code Ann. § 22-9-1-3 (West 1990); Ky. Rev. Stat. Ann. § 207.150 (Michie 1990); Miss. Code Ann. § 43-6-15 (1990); Mont. Code Ann. § 49-2-101 (1990); Nev. Rev. Stat. §§ 281.370, 613.330 (1990); N.H. Rev. Stat. Ann. § 354-A:8 (1990); Okla. Stat. Ann. tit. 25, § 1302 (West 1990); S.C. Code Ann. § 1-13-80(A) (Law. Co-op. 1990); Tenn. Code Ann. § 8-50-103(a) (1990); Utah Code Ann. § 34-35-6 (1990).

[14] *See, e.g.*, La. Rev. Stat. Ann. § 46:2253 (West 1990) (not requiring employer to spend more for architectural modifications than amount allowed as federal tax deduction); Neb. Rev. Stat. § 48-1102 (1990) (not requiring accommodations that entail more than "de minimis expense"); N.C. Gen. Stat. § 168A-3 (1990) (not requiring accommodation if cost of making changes over course of disabled person's employment would exceed 5% of employee's annual salary).

with a disability. The reasonable accommodation requirement thus serves the critical purpose of ensuring that an employer's professed concerns about whether a particular workplace or program can accommodate a person with a disability are not simply accepted at face value, but are tested against an individualized and reasonable assessment of the facts and circumstances of the individual and the job or program in question.

For example, respondent Ash's principal claim is that his public employer refused to take reasonable steps to accommodate his respiratory diseases, even though he was only asking that his employer enforce *its own* no-smoking policy and bring its vehicles into compliance with state law -- and even though he provided evidence from his doctor establishing that these steps were necessary for his continued health. Mr. Ash sought reasonable accommodations as a sensible and workable way of allowing him to continue in his employment without jeopardizing his health. Were his public employer not obligated to provide such accommodation, it is not clear that he either could or would continue in his present employment.

Accordingly, persons with disabilities must be treated on an individualized basis in order to avoid discriminatory treatment (such as requiring an employee with respiratory illnesses to drive vehicles that do not meet state emissions safety standards). This is precisely what reasonable accommodation requirements do. They require employers to address persons with disabilities on an individualized basis and attempt to identify reasonable accommodations that will enable successful employment. At the same time, by ensuring that no defendant must endure an "undue hardship" in accommodating the needs of persons with disabilities, 42 U.S.C. § 12112(b)(5)(A), the ADA properly cabins its scope to meet its goals through measured and reasonable means.

3. Remedies

The ADA's remedial scheme similarly reflects Congress's reasonable decision that the record of pervasive discrimination against individuals with disabilities could be traced, in part, to the inadequacy of many state remedies. For example, in 1990, in 16 States, compensatory damages were wholly unavailable (even to remedy and deter intentional discrimination),[15] and in 3 States, complainants had no private right of action at all.[16]

These remedial and enforcement limits substantially limited the effectiveness of state anti-discrimination laws. They deterred the filing of claims rather than the practice of discrimination. Without effective private rights of action,

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[15] Ala. Admin. Code r. 670-x-4-.03 (1990); Ark. Code contained no prohibition of employment discrimination against the disabled in 1990; Ariz. Rev. Stat. Ann. § 41-1481(G) (West 1990); Colo. Rev. Stat. Ann. §§ 24-34-306, 24-34-405 (West 1990); Conn. Gen. Stat. Ann. §§ 46a-60, 46a-86 (West 1990), *cf. Bridgeport Hosp.* v. *Commission on Human Rights & Opportunities*, 653 A.2d 782 (Conn. 1995); Del. Code Ann. tit. 19, §§ 712, 727 (1990); Md. Ann. Code art. 49B, § 11 (1990); Miss. Code Ann. §§ 25-9-131, -132 (1990); Neb. Rev. Stat. § 48-1119 (1990); N.C. Gen. Stat. § 168A-11(b) (1990); N.D. Cent. Code § 14-02.4-20 (1990); R.I. Gen. Laws § 28-5-24 (1990); S.D. Codified Laws § 20-13-35.1 (Michie 1990); Tex. Lab. Code Ann. § 21.258 (West 1990); Utah Code Ann. § 34A-35-7.1(9), (15) (1990); Wis. Stat. § 111.39 (1990).

Additional States have capped compensatory damages at extremely low amounts. *See, e.g.*, Kan. Stat. Ann. § 44-1005(k) (1990, 2000) (in 1990 and today, limits emotional damages to $2,000); S.C. Code Ann. §§ 43-33-540, -550 (Law. Co-op. 1990, 2000) (in 1990 and today, limits actual damages to $5,000); Wash. Rev. Code § 49.60.250 (1990, 2000) (compensatory damages in administrative proceedings limited to $1,000 in 1990 and $10,000 today); W. Va. Code § 5-11-13 (1990, 2000) (in 1990 and today, compensatory damages in administrative proceedings limited to the equivalent of $1,000 in 1977 dollars).

[16] Ala. Admin. Code r. 670-x-4-.03 (1990); Ala. Code § 21-7-8 (1990); Ark. Code contained no prohibition of employment discrimination against the disabled in 1990; Md. Ann. Code art. 49B, §§ 10, 11 (1990).

complainants had to rely on administrative enforcement schemes and were limited in the relief that they could obtain. Where damages were unavailable, complainants had limited incentive to sue.

The remedial and enforcement provisions of the ADA are a proportionate response to persistent discrimination by state actors. These provisions overcome the specific deficiencies in state laws that made it difficult for many complainants to obtain effective and meaningful relief. The employment discrimination provisions in Title I of the ADA incorporate by reference the enforcement provisions under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 12117(a). Under this scheme, complainants may bring a private right of action in federal court once they have exhausted their administrative remedies with the EEOC. Available relief includes injunctive relief and back pay accruing from two years prior to the filing of the EEOC charge. *Id.* § 2000e-5(g). Compensatory damages are available against respondents who engage in "unlawful intentional discrimination" or who violate the provisions concerning reasonable accommodation. *Id.* § 1981a(a)(2).

Similarly, the public services discrimination provisions in Title II of the ADA incorporate by reference the enforcement provisions under Section 504 of the Rehabilitation Act (which themselves are based on the enforcement provisions of Title VI of the Civil Rights Act of 1964). *Id.* § 12133 (incorporating enforcement provisions of Section 504, 29 U.S.C. § 794a). Under this scheme, plaintiffs may bring a private right of action without exhausting any administrative remedies and may obtain injunctive relief and damages.

By basing the remedies under the ADA on the proven anti-discrimination measures of Title VII and the Rehabilitation Act, Congress again acted prudently and well within its discretion to respond congruently and proportionately to the record of invidious discrimination by creating a uniform national remedy and enforcement scheme to deter

unconstitutional conduct that state remedial schemes, with their many gaps and weaknesses, did not deter.

4. Community Integration

Petitioners also claim that the States had fully addressed discrimination in the area of institutionalization. In reality, the ADA is a proportional response to pervasive discrimination in the form of unjustified institutionalization. See 42 U.S.C. § 12101(a)(3); see also *Olmstead* v. *L.C. ex rel. Zimring*, 527 U.S. 581, 600 (1999) (recognizing "that unjustified institutional isolation of persons with disabilities is a form of discrimination"); *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 464 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part) (noting that the "lengthy and continuing isolation" of persons with disabilities "perpetuated the ignorance, irrational fears, and stereotyping that long have plagued them"). To remedy this past discrimination, ADA regulations require public entities to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d) (1998). Public entities must also make "reasonable modifications," but need not do so if "the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7).

In their Appendix A, petitioners mischaracterize various state statutes as "state policies favoring deinstitutionalization." Nearly all of these state statutes apply only to civil commitment proceedings for a subset of persons with disabilities (those with mental illness), see Appendix, and some are further limited to only those who pose a substantial risk of harm to themselves or others.[17] The ADA, on the other hand, applies to all persons with disabilities residing in

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[17] *See, e.g.*, 405 Ill. Comp. Stat. §§ 5/1-119, 5/3-811 (West 1990); Md. Code Ann. Health-Gen. § 10-632(e)(2) (1990); Mass. Gen. Laws ch. 123 § 8 (1978).

institutions, nursing homes, and other facilities, not just those who have been civilly committed.[18] Moreover, the ADA, unlike many state policy statements, creates enforceable rights to placement in the most integrated setting appropriate, whereas state law at best does not require anyone to be moved unless there is an existing community placement already available and unfilled[19] – a circumstance that rarely occurs. At the same time, the ADA also takes into account the practical and fiscal burdens of implementing reasonable modifications.[20] In so doing, the ADA is yet another congruent and proportional response to the long history of discrimination left unaddressed by the States.

II. INVALIDATING THE ADA PROVISIONS PROVIDING FOR DAMAGES AGAINST THE STATES WOULD SEVERELY UNDERMINE THE PROTECTIONS AFFORDED TO PERSONS WITH DISABILITIES.

The issue before the Court is one of substantial importance, and with substantial consequences, for individuals with disabilities. If this Court invalidates the ADA provisions providing for a damages remedy against the States, persons with disabilities in many States will lack any comparable remedy. Even though many States after 1990 took action to

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[18] *See* 28 C.F.R. § 35.130(d) (applicable to all "qualified individuals with disabilities").

[19] *E.g., Department of Health and Mental Hygiene* v. *Dillman,* 695 A.2d 211 (Md. 1997).

[20] *See* 28 C.F.R. § 35.130(b)(7) (providing exception to reasonable modification requirement if modification fundamentally alters the service, program or activity); *see Olmstead,* 527 U.S. at 604 ("Sensibly construed, the fundamental-alteration component of the reasonable-modification regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities").

upgrade their laws and duplicate the protections afforded by the ADA, a significant number did not. The fact remains that there are substantial gaps and shortcomings in state laws today. For example, even today, 6 States lack a reasonable accommodation requirement,[21] and 2 States still do not allow complainants to bring a private right of action.[22] In 7 other States, a compensatory damages remedy is still unavailable.[23] Even where state laws do provide for a damages remedy against the States, this remedy is not uniformly available to all persons with disabilities in many States due to the fact that many state laws do not cover certain subpopulations of individuals with disabilities. For example, 6 state laws still do not cover people with mental illness;[24] 4 state laws still do not cover people with mental retardation;[25] 8 state laws still

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[21] Ala. Admin. Code r. 670-x-4-.03 (2000); Ala. Code § 21-7-8 (2000); Ga. Code Ann. § 34-6A-4(a) (1999); Haw. Rev. Stat. Ann. § 378-3(3) (Michie 1999); Ind. Code Ann. § 22-9-1-3 (West 2000); Miss. Code Ann. § 43-6-15 (2000); N.H. Rev. Stat. Ann. § 354-A:7 (1999).

[22] Ala. Admin. Code r. 670-x-4-.03 (2000); Ala. Code § 21-7-8 (2000); Md. Ann. Code art. 49B, §§ 10, 11 (1999).

[23] Ariz. Rev. Stat. Ann. § 41-1481(G) (West 2000); Ark. Code Ann. § 16-123-107(c)(2)(A) (Michie 1999); Miss. Code Ann. §§ 25-9-131, -132 (2000); N.C. Gen. Stat. § 168A-11(b) (2000); N.D. Cent. Code § 14-02.4-20 (1999); Utah Code Ann. § 34A-5-107(9) (1999), *cf. Barton* v. *Exam Ctr. Indus. and Gen. Med. Clinic, Inc.*, 994 P.2d 1261, 1267 (Utah 2000); Wis. Stat. § 111.39 (2000).

[24] Ala. Code § 21-7-8 (2000); Ariz. Rev. Stat. Ann. § 41-1461(4) (West 2000); Colo. Rev. Stat. Ann. § 24-34-402(1)(a) (West 1999), *cf. AT&T Techs., Inc.* v. *Royston*, 772 P.2d 1182 (Colo. Ct. App. 1989); Ga. Code Ann. § 34-6A-2(7)(B) (1999); La. Rev. Stat. Ann. § 23:322 (West 2000); Miss. Code Ann. § 43-6-15 (2000).

[25] Ala. Code § 21-7-8 (2000); Ariz. Rev. Stat. Ann. § 41-1461(4) (West 2000); Colo. Rev. Stat. Ann. § 24-34-402(1)(a) (West 1999), *cf. AT&T Techs., Inc.* v. *Royston*, 772 P.2d 1182 (Colo. Ct. App. 1989); Miss. Code Ann. § 43-6-15 (2000).

do not cover people who have a record of impairment;[26] and 8 state laws still do not cover people who are regarded as having an impairment.[27] Finally, even where state statutes nominally offer a remedy, case backlogs and other procedural and resource limitations often make it very difficult for complainants to use state procedures to enforce their rights.

There is no reason to think that the state legislatures will act now to rectify the deficiencies in their laws, given that they have not done so in the ten years since the ADA was enacted. And, of course, discrimination against persons with disabilities will not simply go away. Accordingly, the comprehensive coverage and remedies available under the ADA are vital to the protection of persons with disabilities and many persons with disabilities will be harmed if these protections are taken away.

Moreover, the impact of a decision that the ADA provisions at issue cannot be sustained under Section 5 may go beyond the ADA's damages remedy. Vindication of Congress's decision to invoke its enforcement authority under the Fourteenth Amendment is important because some States are prepared to argue (and, indeed, already have argued)[28] that

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[26] Ala. Code § 21-7-8 (2000); Ark. Code Ann. § 16-123-102 (Michie 1999); Ind. Code Ann. § 22-9-1-3(r) (West 2000); Iowa Code Ann. § 216.2 (West 1999); N.Y. Exec. Law § 292(21)(a) (McKinney 2000); Md. Ann. Code art. 49B, § 15(g) (1999); Miss. Code Ann. § 43-6-15 (2000); Utah Code Ann. § 34A-5-102(5) (2000).

[27] Ark. Code Ann. § 16-123-102 (Michie 1999); Ga. Code Ann. § 34-6A-2(3) (1999); Iowa Code Ann. § 216.2 (West 1999); N.Y. Exec. Law § 292(21)(a) (McKinney 2000); Md. Ann. Code art. 49B, § 15(g) (1999); Miss. Code Ann. § 43-6-15 (2000); Utah Code Ann. § 34A-5-102(5) (2000); Va. Code Ann. § 51.5-3 (Michie 2000).

[28] *See, e.g.*, *Amos* v. *Maryland Dep't of Pub. Safety and Correctional Servs.*, 178 F.3d 212, 223 (4th Cir. 1999) (declining to address whether Congress properly invoked its Commerce Clause authority in enacting the ADA and making it applicable to state prisons after concluding that the statute was a valid exercise of Congress's Section 5 power), *vacated*

Title II of the ADA is invalid in its entirety because it is not within Congress's power under the Commerce Clause or the Spending Clause. *Amici* believe that Title II will be sustained on Commerce Clause grounds, but recognize that the issue will engender much litigation and may ultimately reach this Court. And were the States to prevail in invalidating Title II of the ADA, the protections afforded to individuals with disabilities would be severely undermined. Accordingly, the stakes are significant in this case and invalidation of the ADA's damages remedy against the States would have profound adverse consequences for persons with disabilities.

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without opinion (Dec. 28, 1999); *see also Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 210-11 (1998) (declining to address petitioners' argument that application of Title II of the ADA to state prisons is not a constitutional exercise of Congress's power under either the Commerce Clause or Section 5 because petitioners did not raise the argument below). *Cf. Bradley* v. *Arkansas Dep't of Educ.*, 189 F.3d 745, 757-58 (8th Cir.) (granting petition for rehearing en banc to consider whether § 504 of the Rehabilitation Act is unconstitutional as applied to the States because it exceeds Congress's spending power), *vacated in part, reh'g en banc granted in part sub. nom. Jim C.* v. *Arkansas Dep't of Educ.*, 197 F.3d 958 (8th Cir. 1999).

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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APPENDIX

	ALABAMA	COMMENTS
Prohibits employment discrimination based upon disability	Ala. Admin. Code r. 670-x-4-.01*	Both in 1990 and today, r. 670-x-4-.01 did not apply to the broad category of state employees exempted from coverage, in r. 670-x-3-.01(f)(3), including, *inter alia*, all state university employees, elected officials, and all "inmate help" in state correctional facilities. Both in 1990 and today, § 21-7-8 of the Alabama Code mandated employers to offer publicly-funded employment only to physically disabled persons "on the same terms and conditions" as the "able-bodied." Both in 1990 and today, neither provision contained a reasonable accommodation requirement.

* Applies to state employees only.

Applicable to the State and other public employers	Ala. Admin. Code r. 670-x-4-.01	
Applicable to the State pre-1990**	Ala. Admin. Code r. 670-x-4-.01 (1981)	
Equitable and monetary remedies available	Ala. Admin. Code r. 670-x-4-.03	Both in 1990 and today, r. 670-x-4-.03 required review before the State Personnel Board. Both in 1990 and today, neither r. 670-x-.01 nor § 21-7-8 provide for a private right of action in the Alabama courts.
State policies advancing the hiring of persons with disabilities	Ala. Code § 21-7-8 (1975), § 21-5-1 (1965), § 36-26-16	
State policies requiring accessibility and accommodation	§§ 21-4-1 (1965), 21-7-2, 21-7-3 (1975)	Both in 1990 and today, §§ 21-4-1, 21-7-2, and 21-7-3 applied only to those with a physical disability.

** Date indicated is the year the law both applied to the State and prohibited discrimination on the basis of disability.

State policies favoring de-institutionalization	§§ 22-52-37 (a)(7) (1975), 38-9-6(c) (1977), 22-52-10.1 (1977)	Both in 1990 and today, § 22-52-37 applied only to involuntary commitment proceedings for persons with mental disorders found to pose a "a real and present threat of substantial harm" to themselves or others. Both in 1990 and today, § 38-9-6 applied only to protective placement petitions for adults deemed unable to provide for their own protection from abuse or neglect.

	ALASKA	COMMENTS
Prohibits employment discrimination based upon disability	Alaska Stat. § 18.80.220	
Applicable to the State and other public employers	§ 18.80.300 (4), (16)	
Applicable to the State pre-1990	§§ 18.80.220, 18.80.300(4), (16) (1975)	
Equitable and monetary remedies available	§§ 22.10.020(i), 18.80.130	
State policies advancing the hiring of persons with disabilities	§§ 18.80.200 (1987), 23.15.220 (1960)	

State policies requiring accessibility and accommodation	§§ 35.10.015 (1966), 11.76.130 (1987), 18.80.230 (1965)	In both 1990 and today, § 35.10.015 applied only to public buildings – not all places of public accommodation. In both 1990 and today, § 18.80.230 provided no reasonable accommodation requirement, forbidding only the outright denial of use. Alaska Commission on Human Rights does not have the authority to award compensatory or punitive damages to complainants in cases of public accommodation discrimination. *See McDaniel* v. *Cory*, 631 P.2d 82 (Alaska 1981).
State policies favoring de-institutionalization	§ 47.30.735(d) (1981)	Both in 1990 and today, this statute applied only to involuntary commitment proceedings for an individual who is "mentally ill and as a result is likely to cause harm to [self] or others or is gravely disabled."

	ARIZONA	COMMENTS
Prohibits employment discrimination based upon disability	Ariz. Rev. Stat. § 41-1463.B1	Both in 1990 and today, statute did not cover mental impairments. § 41-1461(4). In 1990, statute did not cover those with a "record of" or "regarded as" having a physical or mental impairment. § 41-1461(4).
Applicable to the State and other public employers	§§ 41-1461.2, -1461.6	
Applicable to the State pre-1990	§§ 41-1463.B1, 41.1461.2, -1461.6 (1985)	
Equitable and monetary remedies available	§ 41-1481.D, .G	Both in 1990 and today, no compensatory damages were available.
State policies advancing the hiring of persons with disabilities	Exec. Order 89-7 (1989), 92-2 (1992)	

State policies requiring accessibility and accommodation	§§ 41-1492.01 (1967), 11-1024 (1965)	In 1990, § 41-1492.01 had not been enacted. In 1990 and today, these statutes did not cover state services, programs or activities.
State policies favoring de-institutionalization	§ 36-540.B (1983)	Both in 1990 and today, this statute applied only to involuntary commitment proceedings for persons with mental disorders found to pose a danger to themselves or others or who are persistently, acutely, or gravely disabled and in need of treatment.

	ARKANSAS	COMMENTS
Prohibits employment discrimination based upon disability	Ark. Code § 16-123-107(a)(1); Exec. Order 93-1 (1993)	In 1990, there was no prohibition against employment discrimination based on disability. Ark. Civil Rights Act, §§ 16-123-101 et seq. was not enacted until 1993. Definition of "disability" does not cover those with "record of" or "regarded as" having a disability. § 16-123-102(3).
Applicable to the State and other public employers	Exec. Order 93-1 (1993)	Exec. Order 93-1 does not cover employment discrimination based on disability; its purpose is to create a Health Care Reform Task Force to provide recommendations to the Government regarding Federal health care reforms.

Applicable to the State pre-1990	Exec. Order 86-1 (1985) (voluntary enforcement)	Exec. Order 86-1 (1990) is merely a general order requiring all state agencies to implement general personnel grievance procedures.
Equitable and monetary remedies available	§§ 16-123-107(c), 19-10-208; Exec. Order 93-1 (1993)	
State policies advancing the hiring of persons with disabilities	§ 20-14-301(b) (1973); § 22-3-1303 (1969)	Both in 1990 and today, § 20-14-301(b) covered only those with physical disabilities. Both in 1990 and today, § 22-3-1303 was limited to preferences for "blind persons operating vending facilities on state property."

State policies requiring accessibility and accommodation	§§ 27-15-301, -306 (1985), 20-14-303 (1973)	In both 1990 and today, § 20-14-202(a) was limited to the physically disabled and included no reasonable accommodation provision. § 20-14-301(a) is a policy statement regarding "equal rights and privileges" for those with physical disabilities with respect to public accommodations. Both in 1990 and today, these statutes did not explicitly cover state services, programs, and activities.
State policies favoring de-institutionalization	§ 20-47-214(c) (1979)	Both in 1990 and today, this statute applied only to involuntary commitment proceedings for persons with mental disorders found to pose a danger to themselves or others.

	CALIFORNIA	COMMENTS
Prohibits employment discrimination based upon disability	Calif. Gov't Code § 12940(a)	In 1990, statute did not cover those with mental illness. In 1990, statute did not cover those with "record of" (except for those diagnosed with cancer, § 12926(f)) or "regarded as" having a disability. § 12926(h).
Applicable to the State and other public employers	§ 12926(d)	
Applicable to the State pre-1990	§§ 12940(a), 12926(d) (1973)	
Equitable and monetary remedies available	§ 12960; 22 Cal. 4th 147, 166-167 (2000)	
State policies advancing the hiring of persons with disabilities	§§ 19230, 19232 (1977); Calif. Educ. Code § 44100 (1977)	

State policies requiring accessibility and accommodation	Gov't Code §§ 4450 (1968), 4450.5 (1984); Calif. Civ. Code §§ 54, 54.1 (1968), 51 (1905)	In 1990, bar against discrimination in public accommodations did not apply to those with mental impairments. In 1990, there was no bar against discrimination in provision of public services, programs, and activities. Cal. Gov't Code § 11135.
State policies favoring de-institutionalization	Calif. Welf. & Inst. Code §§ 5354 (1967), 5325.1 (1978)	Cal. Welf. & Inst. Code § 5354 deals solely with conservatorship proceedings for "gravely disabled persons."

	COLORADO	COMMENTS
Prohibits employment discrimination based upon disability	Colo. Rev. Stat. § 24-34-402(1)(a)-(b)	Both in 1990 and today, this statute did not cover mental disabilities. *See AT&T Techs., Inc.* v. *Royston*, 772 P.2d 1182 (Colo. Ct. App. 1989).
Applicable to the State and other public employers	§ 24-34-401(3)	
Applicable to the State pre-1990	§§ 24-34-402(1)(a)-(b), 24-34-401(3) (1977)	
Equitable and monetary remedies available	§§ 24-34-306, 24-34-405	Both in 1990 and today, no compensatory damages were available.
State policies advancing the hiring of persons with disabilities	§§ 24-34-801 (1979), 26-8-105(d) (1963)	
State policies requiring accessibility and accommodation	§§ 9-5-101 to-104 (1965), 24-34-801 (1971), 24-34-601 (1971)	

State policies favoring de-institutionalization	§§ 27-10-101 (1973), 27-10.5-101 (1975)

CONNECTICUT*		COMMENTS
Prohibits employment discrimination based upon disability	Conn. Gen. Stat. § 46a-60(1)	
Applicable to the State and other public employers	§§ 46a-51(10), 46a-69 to -78	
Applicable to the State pre-1990	§§ 46a-60(1), 46a-51(10); former §§ 4-61c to 4-61k (1973)	
Equitable and monetary remedies available	§ 46a-86(b)	Both in 1990 and today, statute did not provide for emotional distress damages nor for recovery of attorneys' fees. *See Bridgeport Hosp.* v. *Commission on Human Rights and Opportunities*, 653 A.2d 782 (Conn. 1995).

*Conn. Const. art. I, § 20 prohibits denial of equal protection of laws, discrimination and segregation based on physical or mental disability.

State policies advancing the hiring of persons with disabilities	§§ 46a-7 (1977), 46a-70(a) (1973), 31-136 (1957), 46a-70(b)-(c) (1973), 31-138 (1957)	
State policies requiring accessibility and accommodation	§§ 29-269 (1967), 29-271 (1975); § 46a-64 (1973)	In 1990, § 46a-64(b)(3) contained express exclusion of reasonable accommodation requirement.
State policies favoring de-institutionalization	§ 17a-498(c) (orig. § 17-178(c) (1976))	

	DELAWARE	COMMENTS
Prohibits employment discrimination based upon disability	Del. Code Title 19, § 724	
Applicable to the State and other public employers	§ 722(2)	
Applicable to the State pre-1990	§§ 724, 722(2) (1987)	
Equitable and monetary remedies available	§ 712(j),(k), and (g)	Both in 1990 and today, there were no compensatory damages available.
State policies advancing the hiring of persons with disabilities	Title 19 § 721 (1987); Title 16 § 9501(b) (1953)	Both in 1990 and today, § 9501(b) did not cover those with mental impairments.

State policies requiring accessibility and accommodation	Title 29 §§ 7301 to 7306; Title 16 § 9502 (1971); Title 6 § 4504	Both in 1990 and today, § 9502 limited protection to those with a physical disability. Both in 1990 and today, § 4504 contained no explicit obligation to make reasonable accommodations. Both in 1990 and today, under § 4504, there was no private right of action. Both in 1990 and today, these statutes did not explicitly cover state services, programs, and activities.
State policies favoring de-institutionalization	Title 16 § 5010 (1975)	Both in 1990 and today, statute applied only to involuntary civil commitment proceedings for mentally ill persons.

	FLORIDA	COMMENTS
Prohibits employment discrimination based upon disability	Fla. Stat. §§ 760.10, 110.105(2), 110.233(1)	In 1990, there was no accommodation requirement in employment. Also, an employer can discriminate against physically disabled person if disability "prevents the satisfactory performance of the work involved." § 413.08. Both in 1990 and today, § 110.105 prohibited discrimination in public employment unless "physical requirement constitutes a bona fide occupational qualification necessary to proper and efficient administration."
Applicable to the State and other public employers	§§ 760.02(6)-(7), 110.233(1), 110.105(2) (1977)	

Applicable to the State pre-1990	§§ 110.105(2), 760.10, 760.02(6)-(7), 110.233(1) (1977)	
Equitable and monetary remedies available	§§ 760.07, 760.11(5)	
State policies advancing the hiring of persons with disabilities	§ 413.08(3) (1971), § 413.393(1)(i) (1994)	In 1990, there was no state policy "advancing" the hiring of disabled persons, who could be refused employment if "disability prevents the satisfactory performance of the work involved." § 413.08. In 1990, there was no state policy "advancing" the hiring of persons with mental disabilities.

State policies requiring accessibility and accommodation	§ 553.503 (1974 (*see former* § 553.46)); § 413.08 (1949)	Both in 1990 and today, only those with physical disabilities had equal rights to public accommodations, but no requirement to modify or provide any service to a higher degree of accommodation than is required for a person without disability. § 413.08. Both in 1990 and today, these statutes did not explicitly cover services, programs or activities.
State policies favoring de-institutionalization	§ 394.467(1) (b) (1982)	Both in 1990 and today, this provision applied only to involuntary civil commitment proceedings for mentally ill persons who are dangerous or incapable of surviving with "available alternative services."

	GEORGIA	COMMENTS
Prohibits employment discrimination based upon disability	Ga. Code §§ 34-6A-4, 45-19-29	Both in 1990 and today, § 34-6A-4 limited coverage of mental impairments to mental retardation and learning disabilities. § 34-6A-2(7)(B). Both in 1990 and today, § 34-6A-4 did not cover those "regarded as" having a disability. § 34-6A-2(3). Both in 1990 and today, § 34-6A-4(a) contained explicit rejection of reasonable accommodation requirement.
Applicable to the State and other public employers	§§ 34-6A-2(2), 45-19-22(5) (1978)	
Applicable to the State pre-1990	§§ 34-6A-4, 34-6A-2(2), 45-19-29, 45-19-22(5) (1978)	
Equitable and monetary remedies available	§§ 34-6A-6, 45-19-38	

State policies advancing the hiring of persons with disabilities	§ 30-1-2 (1975)	
State policies requiring accessibility and accommodation	§§ 30-3-3 (1984), 30-4-1 (1955)	Both in 1990 and today, § 30-3-3 applied only to government buildings. Both in 1990 and today, § 30-4-1 limited coverage to those with physical impairments. Both in 1990 and today, these statutes did not explicitly cover public services, programs, and activities.
State policies favoring de-institutionalization	§ 37-3-162(a) (*see also* § 88-502.4 (1978))	Both in 1990 and today, these provisions were limited to the treatment of the mentally ill.

	HAWAII	COMMENTS
Prohibits employment discrimination based upon disability	Haw. Rev. Stat. §§ 78-2, 378-2(1)(A)	Both in 1990 and today, § 378-3(3) stated that employers may refuse to hire or discharge any individual "for reasons relating to the ability of the individual to perform the work in question."
Applicable to the State and other public employers	§§ 78-2, 378-1	
Applicable to the State pre-1990	§§ 378(2), 378-1, 78-2 (1980)	
Equitable and monetary remedies available	§ 378-5(b)	
State policies advancing the hiring of persons with disabilities	§ 78-2 (1967)	
State policies requiring accessibility and accommodation	§§ 103-50 (1965), 347-13 (1945), 489-3 (1986)	

State policies favoring de-institutionalization	§ 334-60.2(3) (orig. § 334-60 (1976))	Both in 1990 and today, this statute applied only to involuntary civil commitment proceedings for mentally ill persons who are dangerous or gravely disabled.

	IDAHO	COMMENTS
Prohibits employment discrimination based upon disability	Idaho Code § 67-5909(1)	
Applicable to the State and other public employers	§ 67-5902(6)(b)	
Applicable to the State pre-1990	§§ 67-5909(1), 67-5902(6)(b) (1988)	
Equitable and monetary remedies available	§§ 67-5907, 67-5908	
State policies advancing the hiring of persons with disabilities	§ 56-707(1) (1969)	
State policies requiring accessibility and accommodation	§§ 39-3201 to -3210 (1967), 56-702 (1969), 56-703 (1969)	Both in 1990 and today, these statutes did not cover mental disabilities. Both in 1990 and today, these statutes did not explicitly cover state services, programs, and activities.

State policies favoring de-institutionalization	§ 66-329(k)(2) (1981)	Both in 1990 and today, statute applied only to involuntary civil commitment proceedings for mentally ill persons who are dangerous or gravely disabled.

	ILLINOIS*	COMMENTS
Prohibits employment discrimination based upon disability	775 Ill. Comp. Stat. §§ 5/1-103(Q), 5/2-102(A)	Both in 1990 and today, statutory definition of handicap was limited to characteristics that were unrelated to ability to perform duties of particular job. § 5/1-103(l). Therefore, there is effectively no statutory accommodation requirement. Accommodation requirements in regulations do not include job reassignment.
Applicable to the State and other public employers	§§ 5/1-103(L)	
Applicable to the State pre-1990	§§ 5/1-103(L), (Q) (1979)	

*Ill. Const. art. I, § 19 prohibits employment discrimination against persons with physical or mental disabilities

Equitable and monetary remedies available	§ 5/8A-104	Both in 1990 and today, no private right of action until exhaust administrative procedures (file complaint with Department of Human Rights, appeal to Commission), and judicial review only for abuse of discretion.
State policies advancing the hiring of persons with disabilities	§§ 30/5 (1969), 5/1-102(A) (1980), 5/1-102 (F)-(G) (1980); 20 Ill. Comp. Stat. § 415/19a (1955), § 4007/1 (1992)	Both in 1990 and today, § 30/5 provided employment on same terms and conditions as able-bodied only for persons with physical disability, unless disability "prevents performance of the work involved." No coverage for those with mental or developmental disabilities.

State policies requiring accessibility and accommodation	410 Ill. Comp. Stat. § 2511 (1985); 775 Ill. Comp. Stat. §§ 30/3 (1969), 5/5-102 (1986)	Both in 1990 and today, 410 Ill. Comp. Stat. § 25 imposed minimum standards of accessibility only for persons with physical disabilities. There is no private right of action under this statute. § 30/3 contains no explicit obligation to make reasonable accommodations, and does not apply to those with mental or developmental disabilities.
State policies favoring de-institutionalization	405 Ill. Comp. Stat. § 5/3-811 (1979)	Both in 1990 and today, this statute applied only to involuntary civil commitment proceedings for dangerous mentally ill persons.

	INDIANA	COMMENTS
Prohibits employment discrimination based upon disability	Ind. Code § 22-9-5-19	§ 22-9-5-19 was not in effect in 1990. In 1990, the relevant statute was § 22-9-1-3 et seq. Both in 1990 and today, the definition of disability did not cover those with a "record of" or "regarded as" having a disability. § 22-9-1-3(r). Both in 1990 and today, there was no reasonable accommodation requirement. § 22-9-1-13.
Applicable to the State and other public employers	§§ 22-9-5-10, 22-9-5-15	
Applicable to the State pre-1990	§§ 22-9-1-3 (1975)	
Equitable and monetary remedies available	§§ 22-9-1-6(1), 22-9-1-17	Both in 1990 and today, § 22-9-1-17(c) prohibited the use of jury trials.

State policies advancing the hiring of persons with disabilities	§§ 16-32-3-1 (1969), 16-32-3-5 (1969), 22-9-1-2 (1975), 4-15-12-2 (1977)	
State policies requiring accessibility and accommodation	§§ 22-13-4-1(1) (1987), 16-32-3-1 (1969)	Both in 1990 and today, these statutes did not explicitly cover state services, programs, and activities.
State policies favoring de-institutionalization	§ 12-26-6-8 (orig. 16-14-9.1-9 (1975))	Both in 1990 and today, this statute applied only to involuntary civil commitment proceedings for dangerous mentally ill persons.

	IOWA	COMMENTS
Prohibits employment discrimination based upon disability	Iowa Code § 216.6(1)(a)	In 1990, employment discrimination statute was § 601A.6 (current version at § 216.6). Both in 1990 and today, the statutory definition of "disability" did not cover those with a "record of" (except for those with a positive HIV diagnosis) or "regarded as" having a disability.
Applicable to the State and other public employers	§ 216.2(7), (11)	
Applicable to the State pre-1990	§§ 216.2(7), (11), 216.6 (1)(a) (1972)	Inaccurate cite. In 1990, employment discrimination provision was found at § 610A.6.
Equitable and monetary remedies available	§§ 216.15, 216.16	

State policies advancing the hiring of persons with disabilities	§§ 216C.2 (1967), 216C.1 (1967), 19B.2 (1986), 19B.11 (1986)	
State policies requiring accessibility and accommodation	§§ 104A (1965), 216C.3 (1959), 213C.1, 213C.4 (1967), 216.7 (1972)	
State policies favoring de-institutionalization	§§ 229.14(3) (1975), 225C.14 (1981)	Both in 1990 and today, § 229.14 applied only to "seriously mentally impaired persons."

	KANSAS	COMMENTS
Prohibits employment discrimination based upon disability	Kan. Stat. § 44-1009(1)	In 1990, statute did not cover those with mental impairments. § 44-1002. In 1990, § 44-1002 did not cover those with a "record of" or "regarded as" having a disability.
Applicable to the State and other public employers	§ 44-1002(b)	
Applicable to the State pre-1990	§§ 44-1002(b), 44-1009(1) (1974)	
Equitable and monetary remedies available	§§ 44-1011, 44-1005(k)	Both in 1990 and today, § 44-1005(k) capped awards for emotional damages at $2,000.

State policies advancing the hiring of persons with disabilities	§§ 39-1105 (1969), 44-1001 (1974)	Both in 1990 and today, § 39-1105 applied only to those with a physical disability. In 1990, § 44-1001 applied only to those with a physical disability.
State policies requiring accessibility and accommodation	§§ 58-1301 (1968), 39-1101 (1969), 44-1009(c) (1974)	In 1990, § 58-1301 applied only to individuals with physical disabilities. Both in 1990 and today, § 39-1101 applied only to those with a physical disability and provided for no remedies for violations. In 1990, § 44-1009(c) also limited protection to those with a physical disability.
State policies favoring de-institutionalization	§ 59-2966 (orig. § 59-2917(f) (1976)); § 39-1603 (1990)	Both in 1990 and today, these statutes applied only to those with mental illness.

	KENTUCKY	COMMENTS
Prohibits employment discrimination based upon disability	Ky. Rev. Stat. §§ 207.150, 344.040	In 1990, § 344.040 did not apply to disabilities. In 1990, this statute did not cover those with mental disabilities or communicable diseases. §§ 207.130, 207.140(2). In 1990, this statute did not cover those with a "record of," or who were "regarded as" having, a disability. § 207.130. In 1990, there was no reasonable accommodation requirement. Both in 1990 and today, employer could discriminate if physical disability

		interfered with person's ability adequately to perform assigned job duties. Employer not required to modify physical facilities or exercise more caution for disabled person. § 207.150.
Applicable to the State and other public employers	§§ 207.130 (1), (3); 344.010, 344.030(2)	In 1990, §§ 344.010, 344.030(2) did not apply to disabilities.
Applicable to the State pre-1990	§§ 207.150, 207.130(1), (3) (1976)	
Equitable and monetary remedies available	§§ 207.210(3), (4), 344.230, 344.240, 344.450	In 1990, §§ 344.230, 344.240, 344.450 did not apply to disabilities. Both in 1990 and today, Department of Workplace Standards provided only injunctive relief. § 207.210.
State policies advancing the hiring of persons with disabilities	§§ 344.020(1)(b) (1992), 12.450 to 12.465 (1996)	In 1990, §§ 344.020 did not apply to disabilities. §§ 12.450-12.465 were not in effect in 1990.

State policies requiring accessibility and accommodation	§§ 198B.260 (1980), 258.500 (1966)	Both in 1990 and today, § 258.500 applied only to blind, deaf, and "mobility-impaired" persons with guide dogs. Both in 1990 and today, these statutes did not explicitly cover services, programs or activities.
State policies favoring de-institutionalization	§ 202A.026 (1982)	Both in 1990 and today, applied only to involuntary civil commitment proceedings for mentally ill persons found to pose a danger or threat of danger to themselves or others.

	LOUISIANA*	COMMENTS
Prohibits employment discrimination based upon disability	La. Rev. Stat. § 23.323(A)-(B)	§ 23.322 et seq. did not apply to employment discrimination in 1990. Both in 1990 and today, the definition of disability did not cover mental illness. § 46:2253 (1990), § 23:322 (2000). Both in 1990 and today, statute permits discrimination by employer based on any "cosmetic disfigurement" or "anatomical loss of body systems." § 46:2253(2) (1990), § 23:322(6) (2000). Both in 1990 and today, employer not required to make architectural modifications in excess of the amount allowed as a federal deduction.

*La. Const. art. I, § 12 prohibits public accommodations and public areas from discriminating based on "physical condition."

		§ 46:2253(19) (1990), § 23:322(9) (2000). Both in 1990 and today, private employers not required to incur "any additional costs in the hiring or the promotion of a [disabled] person." § 46:2253(19) (1990), § 23:322(9) (2000).
Applicable to the State and other public employers	§ 23:302(2)	
Applicable to the State pre-1990	§§ 46:2254(B)-(E), 46:2253 (1980)	
Equitable and monetary remedies available	§ 23:303	
State policies advancing the hiring of persons with disabilities	§ 51:2231.A (1992)	
State policies requiring accessibility and accommodation	§§ 40:1731 to 1743 (1977), 46:1953 (1975), 49:146 (1987)	Both in 1990 and today, § 49:146 was simply a policy of non-discrimination with no affirmative accommodation requirement.

State policies favoring de-institutionalization	§ 28:55.E(1) (1977)	Both in 1990 and today, this provision applied to involuntary civil commitment proceedings only for dangerous mentally ill persons.

	MAINE	COMMENTS
Prohibits employment discrimination based upon disability	Me. Rev. Stat. Title 5 § 4572.1	In 1990, this statute did not cover those with a "record of," or who were "regarded as" having, a disability. § 4553.
Applicable to the State and other public employers	§ 4553.4, .7	
Applicable to the State pre-1990	§§ 4572.1, 4553.4, .7 (1973)	
Equitable and monetary remedies available	§§ 4612, 4613	
State policies advancing the hiring of persons with disabilities	Title 26 § 2006.5-C (1969)	
State policies requiring accessibility and accommodation	Title 5 §§ 4593 to 4595 (1973); Title 17 § 1312 (1971); Title 25 § 2701 (1967)	In Title 17 § 1312, there is no explicit obligation to make reasonable accommodations except the right to use guide dogs. In 1990, these statutes did not explicitly cover services, programs or activities.

State policies favoring de-institutionalization	Title 34-B § 3864.5.E(2) (1983)	Both in 1990 and today, this provision applied to involuntary civil commitment proceedings for only mentally ill persons who pose a likelihood of serious harm.

	MARYLAND	COMMENTS
Prohibits employment discrimination based upon disability	Md. Ann. Code Art. 49B § 16	Both in 1990 and today, the statute did not cover those with a "record of," or "regarded as" having, a disability. § 15. Both in 1990 and today, employer could discriminate based on a disability that "reasonably preclude[s] the performance of the employment." § 16(a)(1).
Applicable to the State and other public employers	§§ 7, 15(b), 17A	
Applicable to the State pre-1990	§§ 7, 15(b), 16 (1974)	

Equitable and monetary remedies available	§ 11(e)	Both in 1990 and today, there was no private right of action beyond the administrative context. §§ 10, 11. Both in 1990 and today, no compensatory damages were available.
State policies advancing the hiring of persons with disabilities	Art. 30 § 33 (1966)	Both in 1990 and today, this policy was limited to the blind and deaf, and only encouraged employment "unless it is shown that the particular handicap prevents the performances of the work involved."
State policies requiring accessibility and accommodation	Md. Code Ann, State Fin. & Proc. § 2-509 (1985); Md. Ann. Code art. 83B § 6-102 (1974), art. 30 § 33 (1966), art. 49B § 5 (1974)	Both in 1990 and today, Art. 30 § 33 was limited to the blind and deaf. Both in 1990 and today, these statutes did not explicitly cover services, programs or activities.

State policies favoring de-institutionalization	Md. Health-Gen. § 10-632 (e)(2)(v) (1982)	Both in 1990 and today, this provision applied only to involuntary civil commitment proceedings for dangerous mentally ill persons.

	MASSACHUSETTS*	COMMENTS
Prohibits employment discrimination based upon disability	Mass. Gen. Laws ch. 151B § 4(16)	
Applicable to the State and other public employers	§ 1(5)	
Applicable to the State pre-1990	§§ 1(5), 4(16) (1983)	
Equitable and monetary remedies available	§§ 5, 6	Both in 1990 and today, attorneys' fees were not available.
State policies advancing the hiring of persons with disabilities	ch. 6 § 105-106 (1958)	
State policies requiring accessibility and accommodation	ch. 22 § 13A (1967); ch. 143 § 3W (1973); ch. 272 §§ 92A, 98 (1975)	Both in 1990 and today, these statutes did not explicitly cover services, programs or activities.

*Mass. Const. Amendment art. 114 prohibits discrimination against persons with disabilities in a program or activity within the Commonwealth.

State policies favoring de-institutionalization	ch. 123 § 8 (1978)	Both in 1990 and today, this provision applied only to involuntary civil commitment proceedings for dangerous mentally ill persons.

	MICHIGAN	COMMENTS
Prohibits employment discrimination based upon disability	Mich. Comp. Laws §§ 37.1102, 37.1202	In 1990, these statutes did not cover those "regarded as" having an impairment. § 37.1103. In 1990, coverage for mental disabilities was limited to "mental retardation which is significantly subaverage general intellectual functioning and to a mentally ill restored condition." § 37.1103. In 1990, definition of handicap was limited to characteristics that were unrelated to ability to perform duties of particular job. § 37.1103. Therefore, there was effectively no reasonable accommodation requirement.

Applicable to the State and other public employers	§§ 37.1103(g), 37.1201(b)	
Applicable to the State pre-1990	§§ 37.1102, 37.1103(g), 37.1202 (1976)	
Equitable and monetary remedies available	§§ 37.1606, 37.2605	
State policies advancing the hiring of persons with disabilities	Exec. Order No. 1994-16 (May 23, 1994)	In 1990, there were no policies advancing the hiring of persons with disabilities.

State policies requiring accessibility and accommodation	§§ 125.1351 to 1356 (1966), 37.1302 (1976), 37. 1102 (1976)	Both in 1990 and today, § 37.1302 granted only equal enjoyment of public accommodation, and only if disability "is unrelated to the individual's ability to utilize and benefit from the accommodations." Therefore, there is effectively no reasonable accommodation requirement. Both in 1990 and today, § 125.351 et seq. required accessibility only for "physically limited" persons.
State policies favoring de-institutionalization	§ 330.1469a (1974)	Both in 1990 and today, this provision applied only to civil commitment proceedings for mentally ill persons, and only where no less restrictive alternatives are available.

	MINNESOTA	COMMENTS
Prohibits employment discrimination based upon disability	Minn. Stat. § 363.03	In 1990, forms of reasonable accommodations did not include job reassignment.
Applicable to the State and other public employers	§ 363.01(17), (28)	
Applicable to the State pre-1990	§§ 363.03, 363.01 (1973)	
Equitable and monetary remedies available	§ 363.071	
State policies advancing the hiring of persons with disabilities	§ 256C.01 (1969), § 116J.874	Both in 1990 and today, § 256C.01 applied only to persons with physical disabilities. § 116J.874 was not in effect in 1990.

State policies requiring accessibility and accommodation	§§ 471.465 to .468 (1971), 256C.02 (1969), 363.03 (1975)	Both in 1990 and today, § 256C.02 applied only to persons with physical disabilities, and contained no explicit obligation to make reasonable accommodations except for use of service dogs.
State policies favoring de-institutionalization	§ 253B.09 (1982)	Both in 1990 and today, this provision applied only to involuntary civil commitment proceedings for mentally ill persons.

	MISSISSIPPI	COMMENTS
Prohibits employment discrimination based upon disability	Miss. Code § 25-9-149*	§ 25-9-149 is merely a policy statement. Both in 1990 and today, there was no coverage for persons with mental disabilities. § 43-6-15. Both in 1990 and today, there was no coverage for those with a "record of" or "regarded as having" a disability. § 43-6-15. Both in 1990 and today, employers could discriminate if "disability shall materially affect the performance of the work required by the job." Therefore, there was no reasonable accommodation requirement. § 43-6-15.

*Only applicable to persons seeking public employment

Applicable to the State and other public employers	§ 25-9-149	
Applicable to the State pre-1990	§ 25-9-149 (1984)	
Equitable and monetary remedies available	§§ 25-9-131, 25-9-132	Both in 1990 and today, there were no monetary remedies available.
State policies advancing the hiring of persons with disabilities	§ 43-6-15 (1974)	Both in 1990 and today, this policy applied only to persons with physical disability.
State policies requiring accessibility and accommodation	§§ 43-6-101 to -124 (1972), 43-6-5 (1972)	Both in 1990 and today, these statutes did not explicitly cover services, programs or activities.
State policies favoring de-institutionalization	§ 41-21-73(4) (orig. § 41-21-75 (1975))	Both in 1990 and today, this provision applied only to involuntary civil commitment proceedings for mentally ill persons.

	MISSOURI	COMMENTS
Prohibits employment discrimination based upon disability	Mo. Rev. Stat. § 213.055(1)	
Applicable to the State and other public employers	§ 213.010(7)	
Applicable to the State pre-1990	§§ 213.010(7), 213.055(1) (1978)	
Equitable and monetary remedies available	§ 213.076	Both in 1990 and today, there was no right to a jury trial. § 213.111.
State policies advancing the hiring of persons with disabilities	§§ 209.180 (1977), 286.200 (1977)	Both in 1990 and today, § 209.180 applied only to those with a visual disability.
State policies requiring accessibility and accommodation	§§ 8.610 to .657 (1967), 209.150 (1941), 213.065 (1986)	Both in 1990 and today, § 209.150 addressed the rights of only those with a physical disability, and only affirmative obligation was right to use guide dog.

State policies favoring de-institutionalization	§ 632.335.4 (1980)	Both in 1990 and today, this statute applied only to involuntary civil commitment proceedings for mentally ill persons who are likely to cause serious harm to self or others.

	MONTANA	COMMENTS
Prohibits employment discrimination based upon disability	Mont. Code §§ 49-2-303, 49-4-101, 49-3-201	In 1990, the definition of "disability" did not cover those with a "record of" or "regarded as" having an impairment. §§ 49-2-101, 49-3-101, 39-30-103. In 1990, there was no reasonable accommodation requirement. § 49-2-101. Both in 1990 and today, § 49-4-101 prohibited discrimination only against persons with physical disabilities.
Applicable to the State and other public employers	§ 49-3-201	
Applicable to the State pre-1990	§ 49-3-201 (1975)	
Equitable and monetary remedies available	§§ 49-2-506(b), 49-4-102, 49-3-309(b)	Both in 1990 and today, no private right of action until exhaust administrative remedies. § 49-2-509.

State policies advancing the hiring of persons with disabilities	§§ 49-4-202 (1971), 49-3-202 (1975), 39-30-101 to 102, -106 (1983); Mont. Admin. R. §§ 2.21.1412 to .1414 (1984)	Both in 1990 and today, § 49-4-202 did not apply to mental disabilities. This policy encouraged only the hiring of those with physical disabilities "on the same terms and conditions as the able-bodied, unless it is shown that the particular disability prevents the performance of the work involved."
State policies requiring accessibility and accommodation	Mont. Code §§ 50-60-201(4) (1969), 49-4-211 (1971), 49-2-304 (1974)	Both in 1990 and today, § 49-2-304 prohibited discrimination based on disability unless "distinction is based on reasonable grounds."
State policies favoring de-institutionalization	§ 53-21-127 (1975)	Both in 1990 and today, this provision applied only to civil commitment proceedings for mentally ill persons.

	NEBRASKA	COMMENTS
Prohibits employment discrimination based upon disability	Neb. Rev. Stat. §§ 48-1104, 48-1107.02	In 1990, these statutes did not cover those with a "record of" or "regarded as" having a disability. § 48-1102. In 1990, employer not required to provide accommodation unless it could be done at "de minimis expense" (§ 48-1102(8)).
Applicable to the State and other public employers	§§ 48-1102(2), 48-1126	
Applicable to the State pre-1990	§§ 48-1104, 48-1102(2) (1979)	
Equitable and monetary remedies available	§ 48-1119(4)	In 1990, no compensatory damages were available.
State policies advancing the hiring of persons with disabilities	§ 20-131 (1971)	Both in 1990 and today, State policy only for the employment of disabled persons "on the same terms and conditions as persons without disabilities."

State policies requiring accessibility and accommodation	§§ 81-5, 147 (1974), 20-127 (1971), 20-129 (1971)	Both in 1990 and today, in § 20-127, there was no explicit obligation to make reasonable accommodations. In 1990, § 81-5,147 did not relate to accessibility or accommodation requirements. Both in 1990 and today, these statutes did not explicitly cover services, programs or activities.
State policies favoring de-institutionalization	§ 83-1037 (1976)	Both in 1990 and today, applied only to involuntary civil commitment proceedings for dangerous mentally ill persons.

	NEVADA	COMMENTS
Prohibits employment discrimination based upon disability	Nev. Rev. Stat. §§ 281.370, 613.330	In 1990, the definition of "disability" in these statutes did not cover mental disabilities. In 1990, the definition of "disability" in these statutes did not cover those with a "record of" or "regarded as" having a disability. In 1990, there was no reasonable accommodation requirement. In 1990, employers could discriminate based upon a bona fide occupational qualification or if physical condition "would prevent proper performance of the work." § 613.350.
Applicable to the State and other public employers	§§ 281.370, 613.310(2), (5)	
Applicable to the State pre-1990	§§ 281.370, 613.330, 613.310(2), (5) (1971)	

Equitable and monetary remedies available	§§ 613.405, 613.420, 613.430, 233.170, 233.180	Both in 1990 and today, actual damages were not available in administrative procedures, and recovery for backpay was limited to two years after the most recent unlawful practice. § 233.170. Both in 1990 and today, private right of action only if Equal Rights Commission dismisses complaint. § 613.420.
State policies advancing the hiring of persons with disabilities	§ 284.012 (1969)	In 1990, this policy did not apply if "the particular disability prevents the proper performance of the work involved."
State policies requiring accessibility and accommodation	§§ 338.180 (1973), 651.070 (1969)	Both in 1990 and today, § 338.180 requires accessibility only if there is no "loss of function, space or facility where the general public is concerned." Both in 1990 and today, there was no explicit obligation to make reasonable accommodations. § 651.070. In 1990, provisions related to public services did not cover mental impairments.

State policies favoring de-institutionalization	§ 433A.310.3 (1975)	Both in 1990 and today, this provision applied only to involuntary civil commitment proceedings for dangerous mentally ill persons.

	NEW HAMPSHIRE	COMMENTS
Prohibits employment discrimination based upon disability	N.H. Rev. Stat. § 354-A:7	In 1990, there was no coverage for persons with mental illness. § 354-A:3. In 1990, there was no coverage for those with "record of" or "regarded as having" disability. § 354-A:3. Both in 1990 and today, there was no reasonable accommodation requirement. § 354-A:8 (1990), § 354-A:7 (2000).
Applicable to the State and other public employers	§ 354-A:2(VII)	
Applicable to the State pre-1990	§§ 354-A:2, 354-A:7 (1975)	
Equitable and monetary remedies available	§ 354-A:22	Both in 1990 and today, complainant must exhaust administrative remedies prior to seeking judicial review.

State policies advancing the hiring of persons with disabilities	§ 167-C:5 (1971)	Both in 1990 and today, this policy applied only to persons with physical disability.
State policies requiring accessibility and accommodation	§§ 275-C:14 (1977), 167-C:2 (1971), 155:39-b (1990)	In § 167-C:2, there is no explicit obligation to make reasonable accommodations.
State policies favoring de-institutionalization	§§ 135-C:57 (1986), 135C:40(v) (1975)	

	NEW JERSEY	COMMENTS
Prohibits employment discrimination based upon disability	N.J. Stat. Title 10 §§ 5-4.1, 5-12, 5-29.1	
Applicable to the State and other public employers	§ 5-5.e	
Applicable to the State pre-1990	§§ 5-4.1, 5-12, 5-29.1 (1972)	
Equitable and monetary remedies available	§ 5-13	
State policies advancing the hiring of persons with disabilities	§§ 30:6-17 (1964), 30:6-23 (1982), 11A:7-1 (1986)	
State policies requiring accessibility and accommodation	§§ 52:32-4 to –5 (1971), 10:5-4 (1972), 10:5-29 (1971)	

State policies favoring de-institutionalization	§§ 30:4-24.2(e) (1975), 30:4-27.11(e)(b) (1991), 30:6D-9 (1977)	Both in 1990 and today, § 30:4-24.2(e) applied only to persons with mental disability. Both in 1990 and today, § 30:6D-9 applied only to persons with developmental disabilities.

	NEW MEXICO	COMMENTS
Prohibits employment discrimination based upon disability	N.M. Stat. § 28-1-7	
Applicable to the State and other public employers	§ 28-1-2.A to .B	
Applicable to the State pre-1990	§§ 28-1-7, 28-1-2.A to .B (1973)	
Equitable and monetary remedies available	§ 28-1-10.J	Both in 1990 and today, this provision did not specify which remedies were available.
State policies advancing the hiring of persons with disabilities	§§ 28-7-7 (1967), 28-10-11 (1969), 28-10-1, 28-10-2 (1973)	Both in 1990 and today, § 28-7-7 applied only to the those with physical disability.
State policies requiring accessibility and accommodation	§§ 60-13-44(D) (1967), 28-7-3 (1967), 28-1-7(F) (1973)	

State policies favoring de-institutionalization	§ 43-1-11(c)(3) (1977)	Both in 1990 and today, this statute applied only to involuntary civil commitment proceedings for mentally ill persons who pose a likelihood of serious harm.

	NEW YORK	COMMENTS
Prohibits employment discrimination based upon disability	N.Y. Exec. Law § 296; N.Y. Civ. Serv. Law § 55	Both in 1990 and today, § 296 did not cover those with a "record of" or "regarded as" having a disability. § 292(21)(a). Both in 1990 and today, § 55 did not cover mental impairments.
Applicable to the State and other public employers	N.Y. Exec. Law § 292;* N.Y. Civ. Serv. Law § 55	
Applicable to the State pre-1990	N.Y. Exec. Law §§ 292, 296; N.Y. Civ. Serv. Law § 55 (1974)	
Equitable and monetary remedies available	N.Y. Exec. Law § 297(4)(c), (6), (9)	

**See Matter of Bd. of Higher Educ.* v. *Carter*, 14 N.Y.2d 138, 147 (1964).

State policies advancing the hiring of persons with disabilities	N.Y. Ct. Rules § 25.16 L. 1988 c. 261 § 62 (1988); N.Y. Civ. Serv. Law § 55-b (1977)
State policies - requiring accessibility and accommodation	N.Y. Pub. Bldgs. Law §§ 50, 51 (1972); N.Y. Exec. Law § 296(2) and (2-a) (1974); N.Y. Civ. Rights Law § 47 (1976)
State policies favoring de-institutionalization	N.Y. Mental Hygiene Law § 9.27(d) (orig. § 31.27) (1972)

	NORTH CAROLINA	COMMENTS
Prohibits employment discrimination based upon disability	N.C. Gen. Stat. §§ 126-16, 168A-5	Both in 1990 and today, reasonable accommodation not required if cost of making changes over the course of disabled person's employment would exceed 5% of the employee's annual salary or annualized hourly wage. § 168A-3.
Applicable to the State and other public employers	§§ 126-16, 168A-3(2),(7)	
Applicable to the State pre-1990	§§ 168A-3(2),(7), 168A-5 (1985)	
Equitable and monetary remedies available	§§ 126-37, 168A-11	Both in 1990 and today, § 168A-11 provided for only declaratory or injunctive relief and backpay.

State policies advancing the hiring of persons with disabilities	§§ 143-422.2 (1977), 128-15.3 (1971), 168A-2 (1985), 128-15.3 (1971), 143B-403.1 to 403.2 (1977)	
State policies requiring accessibility and accommodation	§§ 168-2 (1973), 168-3 (1973), 168A-6 (1985)	
State policies favoring de-institutionalization	§ 122C-271 (1973)	Both in 1990 and today, § 122C-271 applied only to involuntary civil commitment proceedings for dangerous mentally ill or retarded persons.

	NORTH DAKOTA	COMMENTS
Prohibits employment discrimination based upon disability	N.D. Cent. Code § 14-02.4-03	
Applicable to the State and other public employers	§§ 14-02.4-02.6, 14-02.4-02.11	
Applicable to the State pre-1990	§§ 14-02.4-03, 14-02.4-02.6 (1983)	
Equitable and monetary remedies available	§§ 14-02.4-19 to -20	Both in 1990 and today, only injunctive relief and backpay were available.
State policies advancing the hiring of persons with disabilities	§ 25-13-05 (1967)	Both in 1990 and today, this policy applied only to persons with physical disabilities.
State policies requiring accessibility and accommodation	§§ 14-02.4-14 (1983), 25-13-02 (1967), 48-02-19 (1973)	Both in 1990 and today, § 25-13-02 applied only to the use of guide dogs.

State policies favoring de-institutionalization	§ 25-03.1-17 (1977)	Both in 1990 and today, this statute applied only to involuntary civil commitment proceedings for mentally ill persons who pose a serious risk of harm to self or others. Both in 1990 and today, the state was not required to create a less restrictive treatment program or facility. § 25-03.3-13.

	OHIO	COMMENTS
Prohibits employment discrimination based upon disability	Ohio Rev. Code § 4112.02	
Applicable to the State and other public employers	§§ 4112.01(A)(1)-(2)	
Applicable to the State pre-1990	§ 4112.01, .02 (1976)	
Equitable and monetary remedies available	§ 4112.02(N)	§ 4112.02(N) relates only to age discrimination claims. Both in 1990 and today, there was no right to a jury trial for suit against state.
State policies advancing the hiring of persons with disabilities	§§ 3304.38 (1996), 124.231(C) (1978)	
State policies requiring accessibility and accommodation	§§ 3781.111 (1965), 4112.02 (1976)	Both in 1990 and today, these statutes did not cover services, programs, or activities of public entities.

State policies favoring de-institutionalization	§ 5122.15(E) (1977)	Both in 1990 and today, this statute applied only to involuntary commitment of mentally ill persons who pose substantial risk of harm to self or others.

	OKLAHOMA	COMMENTS
Prohibits employment discrimination based upon disability	Okla. Stat. Title 25 § 1302, 74 § 840-2.9.A	In 1990, there was no reasonable accommodation requirement. § 1302.
Applicable to the State and other public employers	25 § 1301.1; 74 § 840-2.9.A	
Applicable to the State pre-1990	25 §§ 1301.1, 1302; 74 § 840-2.9.A (1981)	
Equitable and monetary remedies available	25 § 1901	
State policies advancing the hiring of persons with disabilities	74 § 9.30 (1957)	
State policies requiring accessibility and accommodation	61 § 11 (1965); 7 § 19.1 (1968); 25 § 1402 (1985)	
State policies favoring de-institutionalization	43A, § 5-416 (orig. 54.9(A), § 405(B)(1) (1980))	

	OREGON	COMMENTS
Prohibits employment discrimination based upon disability	Or. Rev. Stat. § 659.436	
Applicable to the State and other public employers	§§ 659.400(4), 659.010(6)	
Applicable to the State pre-1990	§ 659.425 (renumbered in 1997) (1973)	
Equitable and monetary remedies available	§§ 659.050 to .070	
State policies advancing the hiring of persons with disabilities	§§ 182.100 (1981), 410.710 (1989), 659.020 (1983), 659.025(2) (1981), 659.405 (1973)	
State policies requiring accessibility and accommodation	§§ 447.210 to 310 (1971), 346.610 to 660 (1967), 659.425(3) (1973)	In 1990, these statutes did not explicitly cover services, programs or activities.

State policies favoring de-institutionalization	§§ 427.031 (1979), 427.007 (1981)	Both in 1990 and today, these statutes applied only to those with mental retardation or other developmental disabilities.

PENNSYLVANIA COMMENTS

Prohibits employment discrimination based upon disability	43 Pa. Cons. Stat. § 955	
Applicable to the State and other public employers	§ 954(b)	
Applicable to the State pre-1990	§§ 955, 954(b) (1974)	
Equitable and monetary remedies available	§§ 962(c), 959	There is no right to a jury trial. *Wertz* v. *Chapman*, 741 A.2d 1272, 1274-79 (Pa. 1999).
State policies advancing the hiring of persons with disabilities	§ 952 (1974), 62 Pa. Cons. Stat. § 3207(d) (1994)	
State policies requiring accessibility and accommodation	71 Pa. Cons. Stat. §§ 1455.1 to 1455.3b (1965); 43 Pa. Cons. Stat. § 955(i) (1974)	Both in 1990 and today, statutes did not explicitly cover services, programs or activities.

State policies favoring de-institutionalization	50 § 7304(f) (1976)	Both in 1990 and today, this statute applied only to involuntary civil commitment of severely mentally disabled persons who pose clear and present danger to self or others.

	RHODE ISLAND*	COMMENTS
Prohibits employment discrimination based upon disability	R.I. Gen. Laws §§ 28-5-7, 36-4-50	
Applicable to the State and other public employers	§§ 28-5-6(6)(i), 36-4-50	
Applicable to the State pre-1990	§§ 28-5-7, 28-5-6(6)(i) (1973)	
Equitable and monetary remedies available	§ 28-5-24	In 1990, compensatory damages were not available.
State policies advancing the hiring of persons with disabilities	§§ 28-5.1-9 (1988), 25-2-13 (1971), 42-51-1 to 42-51-10 (1970)	
State policies requiring accessibility and accommodation	§§ 37-8-15 (1964), 40-9.1-1 (1975), 42-87-2 (1983)	In 1990, these statutes did not explicitly cover services, programs or activities.

*R.I. Const. art. I, § 2 prohibits State entities and those doing business in the State from discriminating against an otherwise qualified person solely based on disability.

State policies favoring de-institutionalization	§ 40.1-5-8(j) (orig. § 40.1-5-8(10)) (1974)	Both in 1990 and today, statute applied only to involuntary civil commitment proceedings for mentally ill persons who pose likelihood of serious harm.

	SOUTH CAROLINA	COMMENTS
Prohibits employment discrimination based upon disability	S.C. Code §§ 1-13-80(A), 1-13-85	In 1990, there was no reasonable accommodation requirement.
Applicable to the State and other public employers	§§ 1-13-30 (d),(e)	
Applicable to the State pre-1990	§§ 1-13-80(A), 1-13-30(d)-(e) (1983)	
Equitable and monetary remedies available	§§ 1-13-90(c)(16), 1-13-90(d)(9)	In 1990 and today, actual damages capped at $5,000. §§ 43-33-540, -550.
State policies advancing the hiring of persons with disabilities	§ 43-33-60 (1962)	Both in 1990 and today, this policy applied only to those with physical disabilities.
State policies requiring accessibility and accommodation	§§ 10-5-250 to 10-5-320 (1962), 10-5-330 (1983), 43-33-20 (1962), 43-33-10 (1962), 43-33-530 (1983)	

State policies favoring de-institutionalization	§§ 44-20-20 (1990), 44-20-390 (1990)	Both in 1990 and today, applied only to those with mental retardation or with head and spinal injuries who pose likelihood of serious harm or lack sufficient capacity to make responsible decisions regarding treatment.

	SOUTH DAKOTA	COMMENTS
Prohibits employment discrimination based upon disability	S.D. Laws Codified §§ 20-13-10, 20-13-23.7, 20-13-10.1, 3-6A-15	In 1990, statute did not cover those "regarded as" having a disability. § 20-13-1.
Applicable to the State and other public employers	§§ 20-13-1(7), (11), 3-6A-15	
Applicable to the State pre-1990	§§ 20-13-10, 20-13-1(7) (1986)	
Equitable and monetary remedies available	§ 20-13-35.1	In 1990, there was no right to civil action and no compensatory damages available.
State policies advancing the hiring of persons with disabilities	§§ 20-13-23.7 (1986), 60-7-2 (1967)	
State policies requiring accessibility and accommodation	§§ 5-14-12 to 14 (1965), 9-46-1.2 (1975), 20-13-23.2 (1976), 20-13-23 (1986)	

State policies favoring de-institutionalization	§ 27A-10-9.1 (1991); *former* §§ 27A-9-16.1 (1981), 27A-12-3.6 (1975)	Both in 1990 and today, these statutes applied only to involuntary civil commitment proceedings for dangerous mentally ill persons.

	TENNESSEE	COMMENTS
Prohibits employment discrimination based upon disability	Tenn. Code § 8-50-103(a)	In 1990, this statute did not cover those with a "record of" or "regarded as" having a disability. In 1990, statute provided no reasonable accommodation requirement.
Applicable to the State and other public employers	§ 8-50-103(a)	
Applicable to the State pre-1990	§ 8-50-103(a) (1976)	
Equitable and monetary remedies available	§§ 4-21-311, 8-50-103(b)(2)	Both in 1990 and today, § 4-21-311 applied only to remedies available in housing discrimination cases.
State policies advancing the hiring of persons with disabilities	§§ 71-4-202 (1972), 8-50-104 (1976)	

State policies requiring accessibility and accommodation	§§ 68-120-201 to 205 (1970), 62-7-112 (1955)	Both in 1990 and today, these statutes did not explicitly cover services, programs or activities.
State policies favoring de-institutionalization	§ 33-6-104(b) (orig. § 33-604(a)) (1976)	Both in 1990 and today, applied only to involuntary civil commitment proceedings for mentally ill persons who pose likelihood of serious harm.

	TEXAS	COMMENTS
Prohibits employment discrimination based upon disability	Tex. Lab. Code § 21.051	In 1990, this statute did not cover those "regarded as" having a disability.
Applicable to the State and other public employers	§ 21.002(8)(D)	
Applicable to the State pre-1990	§§ 21.051, 21.002 (1983)	
Equitable and monetary remedies available	§ 21.258	In 1990, only equitable relief available; no compensatory damages were available.
State policies advancing the hiring of persons with disabilities	Tex. Hum. Res. §§ 122.001 (1975), 121.003, 121.001 (1979)	
State policies requiring accessibility and accommodation	Rev. Civ. Stat. Ann. art. 9102 (1979); Hum. Res. Code § 121.003 (1979)	Both in 1990 and today, these statutes did not explicitly cover services, programs or activities.

State policies favoring de-institutionalization	Tex. Health & Safety Code § 574.036 (d) (1983)	Both in 1990 and today, this statute applied only to involuntary civil commitment proceedings for mentally ill persons who pose serious risk of harm or cannot provide for own basic needs.

	UTAH	COMMENTS
Prohibits employment discrimination based upon disability	Utah Code § 34A-5-106	In 1990 and today, this statute did not cover those with a "record of" or "regarded as" having a disability. § 34-35-2(9) (1990), § 34A-5-102(5) (1999). In 1990, there was no reasonable accommodation requirement. § 34-35-6.
Applicable to the State and other public employers	§ 34A-5-102(8)(a)	
Applicable to the State pre-1990	§§ 34A-5-102, 34A-5-106 (1979)	
Equitable and monetary remedies available	§ 34A-5-107(A)	Both in 1990 and today, compensatory damages were not available. § 34-35-7.1(9), (15) (1990), § 34A-5-107(9) (1999). *See Barton* v. *Exam Ctr. Indus. and Gen. Med. Clinic, Inc.*, 994 P.2d 1261, 1267 (Utah 2000).

State policies advancing the hiring of persons with disabilities	§§ 26-30-3 (1981), 53A-24-114 (1995)	
State policies requiring accessibility and accommodation	§§ 26-29-1 to 4 (1981), 26-30-1 (1981)	Both in 1990 and today, these statutes did not explicitly cover services, programs or activities.
State policies favoring de-institutionalization	§ 62A-12-234 (10)(d) (orig. § 64-7-36(10)(d)) (1975)	Both in 1990 and today, this statute applied only to involuntary civil commitment proceedings for dangerous mentally ill persons.

	VERMONT	COMMENTS
Prohibits employment discrimination based upon disability	Vt. Stat. 21 § 495(a)(1)	
Applicable to the State and other public employers	§ 495d(1)	
Applicable to the State pre-1990	§§ 495, 495d (1981)	
Equitable and monetary remedies available	§ 495b(b)	
State policies advancing the hiring of persons with disabilities	Title 21 §§ 497 (1963), 497a (1963)	
State policies requiring accessibility and accommodation	Title 21 §§ 273-276 (1987); Title 9 § 4502 (b)-(c) (1987)	In 1990, there was no explicit obligation to make reasonable accommodations.
State policies favoring de-institutionalization	Title 18 § 7617(c) (1977)	Both in 1990 and today, statute applied only to involuntary civil commitment proceedings for dangerous mentally ill persons.

	VIRGINIA	COMMENTS
Prohibits employment discrimination based upon disability	Va. Code §§ 51.5-41.A, 2.1-716, 2.1-116.06	Both in 1990 and today, statutes did not cover those "regarded as" having a disability. § 51.5-3.
Applicable to the State and other public employers	§§ 51.5-41.A, 2.1-116.06	
Applicable to the State pre-1990	§§ 51.5-41.A, 2.1-716 (1985)	
Equitable and monetary remedies available	§§ 51.5-46, 2.1-116.07.B	Both in 1990 and today, relief excluded compensatory damages for pain and suffering. Both in 1990 and today, backpay limited to 180 days prior to the filing of a complaint.
State policies advancing the hiring of persons with disabilities	§§ 2.1-715 (1987), 2.1-116.10 (1979), 51.5-41.B (1972), 2.1-116.14 (1979)	

State policies requiring accessibility and accommodation	§§ 2.1-516 (1970), 51.5-44 (1972); 2.1-715 (1987)	Both in 1990 and today, these statutes contained no explicit obligation to make reasonable accommodation. Both in 1990 and today, these statutes did not explicitly cover services, programs or activities.
State policies favoring de-institutionalization	§ 37.1-67.3 (1976)	Both in 1990 and today, statute applied only to involuntary civil commitment proceedings for mentally ill persons who pose likelihood of serious harm or are substantially unable to take care of self.

WASHINGTON		COMMENTS
Prohibits employment discrimination based upon disability	Wash. Rev. Code § 49.60.180	
Applicable to the State and other public employers	§ 49.60.040 (1), (3)	
Applicable to the State pre-1990	§§ 49.60.180, 49.60.040 (1), (3) (1973)	
Equitable and monetary remedies available	§ 49.60.250	Compensatory damages in administrative proceedings were capped at $1,000 in 1990, and $10,000 today.
State policies advancing the hiring of persons with disabilities	§§ 70.84.080 (1969), 70.84.010 (1969), 49.60.010 (1973), 50.12.250 (1987)	

State policies requiring accessibility and accommodation	§§ 19.27.031 (5) (1985), 70.92.110 (1975), 70.84.010 (1969)	
State policies favoring de-institutionalization	§§ 71.05.320 (1973), 17.24.015 (1989)	Both in 1990 and today, applied only to involuntary civil commitment proceedings for mentally ill persons who pose likelihood of serious harm or are gravely disabled.

	WEST VIRGINIA	COMMENTS
Prohibits employment discrimination based upon disability	W.Va. Code § 5-11-9	
Applicable to the State and other public employers	§ 5-11-3(d)	
Applicable to the State pre-1990	§§ 5-11-9, 5-11-3(d) (1973)	
Equitable and monetary remedies available	§§ 5-11-13(b), (c)	Both in 1990 and today, only incidental compensatory damages (the modern equivalent of $1,000 in 1977) were available in administrative proceedings.
State policies advancing the hiring of persons with disabilities	§§ 5-15-7 (1969), 5A-3A-1 (1990)	
State policies requiring accessibility and accommodation	§§ 5-11-2 (1981), 5-15-4 (1969), 5-11-9(6) (1973)	

State policies favoring de-institutionalization	§§ 27-5-3(a) (1979), 27-5-4(j)(2) (1979)	Both in 1990 and today, applied only to involuntary civil commitment proceedings for mentally ill persons who pose likelihood of serious harm.

	WISCONSIN	COMMENTS
Prohibits employment discrimination based upon disability	Wis. Stat. §§ 111.321-.322, 111.34	
Applicable to the State and other public employers	§ 111.32(6)(a)	
Applicable to the State pre-1990	§§ 111.321-.322, 111.32(6)(a), 111.34 (1965)	
Equitable and monetary remedies available	§ 111.39(c)	Both in 1990 and today, there were no compensatory damages available.
State policies advancing the hiring of persons with disabilities	§ 230.01(2) (1977); 1989 Act 345 § 1 (1989); Wis. Admin. Code ER-MRS 27.03(1), 27.04(1), 27.05(1) (1988)	
State policies requiring accessibility and accommodation	§§ 101.13 (1963), 346.503 (1981), 174.056 (1967)	

State policies favoring de-institutionalization	§ 51.20(13)(c) (1975)	Both in 1990 and today, applied only to involuntary civil commitment proceedings for dangerous mentally ill persons.

	WYOMING	COMMENTS
Prohibits employment discrimination based upon disability	Wyo. Stat. § 27-9-105(a)	
Applicable to the State and other public employers	§ 27-9-102(b)	
Applicable to the State pre-1990	§§ 27-9-102(b), 27-9-105(a) (1985)	
Equitable and monetary remedies available	§ 27-9-106(g)	
State policies advancing the hiring of persons with disabilities	§§ 27-1-110 to -111 (1967), 9-2-115 (1965)	
State policies requiring accessibility and accommodation	§§ 16-6-501 to 504 (1969), 35-13-201 (1967)	Both in 1990 and today, these statutes did not explicitly cover services, programs or activities.

State policies favoring de-institutionalization	§ 25-10-110(j) (1981)	Both in 1990 and today, applied only to involuntary civil commitment proceedings for mentally ill persons who pose imminent threat of physical harm.

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No. 99-1240

In The

SUPREME COURT OF THE UNITED STATES

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA AND THE ALABAMA DEPARTMENT OF YOUTH SERVICES, *Petitioners*,

v.

PATRICIA GARRETT AND MILTON ASH, *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF SENATORS DOLE, HARKIN, HATCH, JEFFORDS, AND KENNEDY, AND REPRESENTATIVES BARTLETT AND HOYER AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*

Amici,[1] Senators Robert Dole, Tom Harkin, Orrin Hatch, Jim Jeffords, and Edward Kennedy, and Representatives Steve Bartlett and Steny Hoyer, are five current and two former Members of Congress who played leadership roles in the development and passage of the Americans with Disabilities Act (ADA) from 1988 to 1990. Relevant biographical information regarding each of the *amici* is provided in the Appendix. The interest of the *amici* is to provide the Court with information regarding the concerns addressed by Congress through passage of the ADA.

SUMMARY OF ARGUMENT

During consideration of the ADA, Congress heard extensive evidence regarding the discrimination experienced by people with disabilities. Such discrimination arose from a series of factors: the discomfort that people without disabilities experienced when dealing with people with disabilities (either because of repulsion, fear, or embarrassment); the fact that disability was stigmatized and considered a negative characteristic; that fact that people with disabilities were subject to false stereotypes; the fact that people with disabilities were the object of patronization and pity; and the fact that societal decisions were often made as if people with disabilities were not part of our society.

The factors identified by Congress -- discomfort, stigma, false stereotyping, pity, and invisibility -- all stood in the way of individuals with disabilities receiving equal opportunities in jobs, services, and goods. The goal of the ADA, therefore, was to ensure that individuals with disabilities would be considered

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[1] Counsel for the *amici curiae* authored this brief in its entirety. No person or entity other than the *amici curiae*, its staff, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent from all parties have been filed with the Clerk of the Court.

on their merits and qualifications, and not on the basis of animus, fear, stereotype, or pity.

Discrimination against people with disabilities arising from the factors found by Congress is unconstitutional under the Equal Protection Clause. *See City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985). Governments may enact classifications based on disability, without fear that such classifications will be second-guessed by the judiciary, as long as the classifications are adopted for some legitimate purpose. Governments may not, however, simply use disability as a proxy for decision-making without providing some rational justification. While this standard is not difficult to meet as long as government seeks to achieve some legitimate objective, government fails to meet even this standard if its use of disability as a proxy is based on discomfort, stigma, false stereotyping, or pity, rather than on reality and facts.

The testimony received by Congress indicated that employers, including state and local governmental managers, were using the fact of an individual's disability as a proxy for assuming that such individual would not be appropriate for employment. Use of disability in this manner was not a benign, rational means of achieving other legitimate governmental interests (such as hiring productive, qualified workers). Rather, such use of disability was based on feelings of discomfort with people with disabilities, or on unjustified, irrational concerns regarding people with disabilities' lack of productivity that was based on stereotypes or stigma, rather than on reality.

In response to these facts, Congress passed the ADA. The various employment provisions of the ADA were measures designed both to prevent and remedy the unconstitutional conduct observed by Congress. Moreover, these measures were

congruent and proportionate responses to the conduct observed by Congress.

Congress prophylactically precluded the possibility that disability would be used unconstitutionally as a proxy by mandating that employers engage in an individualized assessment of the qualifications of a person with a disability. The reasonable accommodation provision of the ADA likewise serves a prophylactic purpose by ensuring that employers may not use the pretext of cost to justify or mask otherwise unconstitutional conduct. Finally, the ADA's disparate impact requirement precludes the unjustified use of physical qualification standards, or unmodified job-related policies, that often masks, or operates in tandem with, prejudice, fear, stigma, and discomfort regarding people with disabilities.

A decision in this case that Congress acted within its authority when it abrogated States' sovereign immunity under the ADA will not open the floodgates for Congress to enact any law that abrogates States' sovereign immunity. To the contrary, it will stand for the simple proposition that -- in the case of the ADA -- Congress correctly took note of likely unconstitutional conduct on the part of the States and passed a congruent and proportional statute in response.

ARGUMENT

I. IN PASSING THE ADA, CONGRESS WAS MOTIVATED BY A DESIRE TO EFFECTUATE THE EQUAL PROTECTION GUARANTEE OF THE FOURTEENTH AMENDMENT AND NOT SOLELY BY "POLICY" CONSIDERATIONS.

Petitioners argue that Congress was motivated solely by "Article I policy concerns" in passing the ADA, and that a review of the text and legislative record of the ADA confirms

that Congress was not even "pretend[ing] to 'respond' to State action, to say nothing of unconstitutional State action." Pet. Br. at 31. Indeed, Petitioners argue, the legislative history does not reveal "any discussion of what the Constitution requires in this area or how the ADA is designed to meet those requirements." *Id.* at 36.

Petitioners mistakenly assume that the "policy" considerations motivating Congress to pass the ADA were entirely removed from Congress' desire to effectuate the equal protection guarantee of the Fourteenth Amendment. Moreover, Petitioners incorrectly assume that because Members of Congress did not explicitly characterize the conduct engaged in by State officials as unconstitutional, Congress was not seeking to effectuate the equal protection guarantee of the Fourteenth Amendment when it passed the ADA.

Based on extensive testimony gathered by Congress, several major policy considerations emerged to motivate passage of the ADA. These included the fact that non-disabled individuals often experienced discomfort around people with disabilities (either because of repulsion or fear or because of embarrassment in relating to people with disabilities); that disability was stigmatized and considered a negative characteristic; that people with disabilities were subjected to false stereotypes; that people with disabilities were the object of patronization and pity; and that societal decisions were often made as if people with disabilities were not part of our society.[2] Congress was made aware of the fact that such discomfort, stigma, false stereotyping, pity, and invisibility all stood in the

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[2] *See generally* UNITED STATES COMMISSION ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 17-27 (1983).

way of individuals with disabilities receiving equal opportunities in jobs, services, and goods.[3]

The goal of the ADA, therefore, was to ensure that individuals with disabilities would be considered on their merits and qualifications, and not on the basis of animus, fear, stereotype, or pity. As far as Congress was concerned, these inappropriate and illegitimate views of people with disabilities, and the subsequent remedial purpose of the ADA, applied as equally to State officials as it did to private individuals.[4]

With these policy considerations in mind, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce" to pass the ADA. 42 U.S.C. § 12101(b)(4) (1998). Congress did not parse out the reach and boundaries of each of these separate powers. But its failure to do so cannot be taken as evidence that it did not intend to enforce the equal protection guarantee of the Fourteenth Amendment through passage of the ADA -- as Congress expressly noted it was doing.

Indeed, this brief will demonstrate that Congress *was* aware of a pattern of likely unconstitutional conduct on the part of the States, and that the ADA was a proportionate and congruent response to that pattern of conduct. Under current Supreme Court jurisprudence, of course, this Court must feel confident that Congress acted pursuant to such concerns in order to justify its abrogation of the States' sovereign immunity. *See Seminole Tribe v. Florida*, 517 U.S. 44 (1996)

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[3] *See, e.g.*, 136 CONG. REC. S9684 (daily ed. July 13, 1990) (statement of Sen. McCain); 136 CONG. REC. S9695 (daily ed. July 13, 1990) (statement of Sen. Dole); 136 CONG. REC. S9697 (daily ed. July 13, 1990) (statement of Sen. Harkin).

[4] *See infra* pp. 15-20.

(overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)).

At a minimum, however, this Court should not presume that such concerns did not exist merely because Congress did not include explicit headings, such as "Unconstitutional Conduct on the Part of States," that would now be appropriate. Rather, the "policy" considerations that Petitioners acknowledge motivated passage of the ADA, *see* Pet. Br. at 33-36, and which applied equally to State officials and to private individuals, formed precisely the basis for Congress' legitimate effectuation of the Fourteenth Amendment guarantee of equal protection under the law through passage of the ADA.

II. THERE WAS A SUFFICIENT PATTERN OF LIKELY UNCONSTITUTIONAL CONDUCT ON THE PART OF THE STATES TO WARRANT PASSAGE OF THE ADA UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT.

A. The Court's View of Unconstitutional Conduct Based on Disability is Consistent with the View Implemented by Congress in Passage of the ADA.

In *City of Boerne v. Flores*, the Court clarified for Congress that the legislature cannot "decree the substance of the Fourteenth Amendment's restrictions on the States . . . . [Congress] has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." 521 U.S. 507, 519 (1997). As the Court reaffirmed in *Kimel v. Florida Bd. of Regents*, "[t]he ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch." 120 S. Ct. 631, 644 (2000) (citing *City of Boerne*, 521 U.S. at 536).

Thus, to determine whether there was a pattern of unconstitutional conduct on the part of the States on the basis of disability prior to passage of the ADA, it is necessary to determine what this Court would have considered to be a violation of the Fourteenth Amendment with regard to disability. There was only one case that Congress had before it, prior to passage of the ADA, that spoke to that issue: *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985).[5] Based on the Court's reasoning and holding in that case, Congress had reason to believe that States were engaging in a likely pattern of unconstitutional conduct on the basis of disability. Moreover, nothing in the Court's equal protection jurisprudence since that time has reflected a change in what would have been considered likely unconstitutional state conduct.[6]

In *Cleburne*, the Court concluded that a zoning ordinance was unconstitutional as applied to the denial of a special use permit for a group home that would house 13 mentally retarded individuals. Justice White, writing for the majority, noted that it was not appropriate, under separation of powers principles, to subject all governmental classifications using disability to heightened judicial scrutiny. As Justice White explained:

> The lesson of *Murgia* [, *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976),] is that where individuals

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[5] In *Schweiker v. Wilson*, 450 U.S. 221 (1981), decided prior to the passage of the ADA, the Court concluded that a challenged provision of the Social Security Act did not classify individuals solely on the basis of mental illness and upheld the law as a rational allocation of federal resources. *Heller v. Doe*, 509 U.S. 312 (1993), another case applying rational basis review, was decided following passage of the ADA.

[6] In *Heller v. Doe*, the Court upheld Kentucky's different involuntary commitment procedures for people with mental illness and mental retardation as related to legitimate governmental objectives. 509 U.S. at 333.

> in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued . . . . [I]t is undeniable, and it is not argued otherwise here, that those who are mentally retarded have a reduced ability to cope with and function in the everyday world . . . . They are thus different, immutably so, in relevant respects, and the States' interest in dealing with and providing for them is plainly a legitimate one. How this large and diversified group is to be treated under the law is a difficult and often a technical matter . . . . Heightened scrutiny inevitably involves substantive judgments about legislative decisions, and we doubt that the predicate for such judicial oversight is present where the classification deals with mental retardation. 473 U.S. at 441-443 (footnote omitted).

While the Court recognized that many laws benefitting people with mental retardation would presumably withstand examination under a heightened scrutiny test, *see id.* at 444, it declined to apply that standard of review. As Justice White explained,

> Even assuming that many of these laws could be shown to be substantially related to an important governmental purpose, merely requiring the legislature to justify its efforts in these terms may lead it to refrain from acting at all . . . . Especially given the wide variation in the abilities and needs of the retarded themselves, governmental bodies must have a certain amount of flexibility and freedom from judicial oversight in shaping and limiting their remedial efforts. *Id.* at 444-445.

With regard to the actual governmental action in the case before it, the Court concluded that requiring a special use permit only for the group home of mentally retarded individuals (and not, for example, for lodging houses, fraternity houses, or nursing homes for the elderly) appeared to rest on "an irrational prejudice against the mentally retarded," and could not be justified under any of the rationales proffered by the local government. *Id.* at 449-450. As the Court explained:

> It is true, as already pointed out, that the mentally retarded as a group are indeed different from others not sharing their misfortune, and in this respect they may be different from those who would occupy other facilities that would be permitted in an R-3 zone without a special permit. But this difference is largely irrelevant unless the [group home at issue] and those who would occupy it would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not. Because in our view the record does not reveal any rational basis for believing that the [group] home would pose any special threat to the city's legitimate interests, we affirm the judgment below insofar as it holds the ordinance invalid as applied in this case. *Id.* at 448.[7]

Justice Marshall, joined by Justices Brennan and Blackmun, concurring in part and dissenting in part, noted that he agreed with the "holding and principle" of the majority, which he described as "the principle that mental retardation *per se* cannot be a proxy for depriving retarded people of their

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[7] Justice Stevens, joined by Chief Justice Burger, added a concurring opinion primarily to note that prior Supreme Court cases had not truly delineated "well-defined standards" of review, but rather had "reflect[ed] a continuum of judgmental responses to differing classifications which have been explained in opinions by terms ranging from 'strict scrutiny' at one extreme to 'rational basis' at the other." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 451 (1985).

rights and interests without regard to variations in individual ability." *Id.* at 455.[8]

The Court's opinion in *Cleburne* thus established for Congress the "interpretation and determination of the Fourteenth Amendment's substantive meaning" with regard to classifications based on disability. *Kimel,* 120 S. Ct. at 644. Under the Court's approach, federal, state, and local governments could enact classifications based on disability, without fear that such classifications would be second-guessed by the judiciary, as long as the classifications were adopted for some legitimate governmental purpose. Indeed, the Court in *Cleburne* had observed that "a civilized and decent society *expects* and *approves* such legislation [providing special treatment for people with mental retardation]," 473 U.S. at 444 (emphasis added), and specifically adopted a deferential standard of review toward such legislation to ensure that legislatures would not be chilled from adopting such laws. *Id.* Thus, as Congress saw it, prior to passage of the ADA, a number of state laws and practices that treated people with disabilities differently would be constitutional under the Fourteenth Amendment.

On the other hand, the Court's ruling in *Cleburne* made equally clear that federal, state, and local governments could not simply use mental retardation (or presumably, other disabilities) as a proxy for decision-making without providing some rational justification. For example, a government could not simply assert that "no blind people can be teachers," or "no

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[8] Justices Marshall, Brennan and Blackmun, nevertheless, dissented from "the way the Court reach[ed] its result" because they could not "accept the Court's disclaimer that no 'more exacting standard' than ordinary rational basis review" was being applied and because they believed the city's ordinance should have been invalidated on its face, rather than as applied. 473 U.S. at 456.

people with hearing impairments can live in low-income housing," without concern of constitutional violation. Such policies, which used disability as a proxy for qualifications, would be similar to the City of Cleburne's policy that "a group home for 13 people with mental retardation cannot locate in this zone without a special use permit." In such cases, the Equal Protection Clause, as interpreted by the Supreme Court, would require the government to justify its policy as having a rational basis.

This constitutional standard would not be a heavy burden for government to meet as long as it was seeking to achieve some legitimate governmental objective. But a government would find it difficult to meet even this standard if its use of disability as a proxy was based on discomfort, stigma, false stereotyping, or pity, rather than on reality and facts. Thus, for example, it would not be difficult for a government to justify a policy that "no blind people can be bus drivers." However, it would presumably be more difficult for a government to justify a policy that "no blind people can be teachers," just as it was difficult (and ultimately, impossible) for the City of Cleburne to justify its policy regarding people with mental retardation.

Based on the Court's jurisprudence, therefore, Congress would have viewed the practical results of the rational basis constitutional standard for disability as different from the practical results of the analogous standard for age. As the Court later explained in *Kimel*:

> Under the Fourteenth Amendment, a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests. The Constitution does not preclude reliance on such generalizations. That age proves to be an inaccurate proxy in any individual case is irrelevant. "Where rationality is the test, a State 'does not violate the Equal Protection

> Clause merely because the classifications made by its laws are imperfect." Finally, because an age classification is presumptively rational, the individual challenging its constitutionality bears the burden of proving that the "facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." 120 S. Ct. at 646 (citations omitted).

This practical application of the rational basis standard for age stands in stark contrast to the Court's analysis and holding in *Cleburne*, in which the City of Cleburne was not permitted to use mental retardation as a proxy for demanding a special use permit and, indeed, was required to affirmatively provide some rational justification for its use of mental retardation in that fashion. *See supra* pp. 7-11.

It makes sense, however, that classifications based on disability and on age would both receive rational basis review by the courts -- and yet that disability would not be permitted to be used as a proxy without some affirmative justification, while age would be permitted to be used in such a fashion for constitutional purposes. Because government may often need to legislate on the basis of disability, in the same manner in which it may need to legislate on the basis of age or other characteristics (and in a manner in which it would be rare, for example, for government to legislate on the basis of race or gender), the Court in *Cleburne* concluded that, under a separation of powers model, it was legitimate to restrict judicial review of classifications, based on either age or disability, to a rational basis standard. 473 U.S. at 441-443; *see also supra* pp. 7-11.

The fact that classifications based on disability and age both receive rational basis scrutiny does not, however, concomitantly mean that disability may be used as a proxy for qualifications in the same manner that age may. This is

because the essence of rational basis review is that a court will "'not overturn such [government action] unless the varying treatment of different groups or persons is *so unrelated* to the achievement of *any combination of legitimate purposes* that we can only conclude that the [government's] actions were irrational.'" *Kimel*, 120 S. Ct. at 646 (citation omitted) (emphasis added). In the case of age (and certainly in the case of most characteristics that receive rational basis review, ranging from home ownership to employment and family status),[9] there is usually no reason for a court to *presume* a government is using age (or the other characteristics) as a proxy for anything other than a legitimate government purpose.

The picture is quite different, however, for individuals with disabilities. Such individuals have been subject to a history of exclusion, discomfort, stigma, stereotyping, and pity. *See generally* DISABLED PEOPLE AS SECOND-CLASS CITIZENS (Myron G. Eisenberg et al. eds., 1982) (an account of the obstacles faced by people with disabilities); WITH THE POWER OF EACH BREATH (Susan E. Browne et al. eds., 1985) (an anthology of stories from women with disabilities). The reality and impact of such attitudes was captured well by Charles Crawford, Commissioner of the Massachusetts Commission for the Blind:

> For far too long and far too many centuries, disabled people have felt the pain of discrimination, of being held separate, at being looked at as different, as somehow being viewed as lesser . . . . I personally have felt the discrimination, the isolation, the sense of helplessness and the sense of no ability to relate to other people because they have shut me out. *Oversight Hearing on H.R. 4498,*

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[9] *See, e.g., Nordlinger v. Hahn*, 505 U.S. 1 (1992); *City of New Orleans v. Dukes*, 427 U.S. 297 (1976); *Dandridge v. Williams*, 397 U.S. 471 (1970).

Americans with Disabilities Act of 1988: Hearing Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor, 100th Cong. 27 (1988).

Given this history with regard to people with disabilities, one understands how the Court in *Cleburne* would not presume that, when government uses disability as a proxy, it is presumptively doing so because of some legitimate governmental purpose, rather than as a result of irrational prejudice.[10] Thus, as *Cleburne* established, when government uses disability as a proxy, it must proffer some rational reasons for such use; if those reasons are not persuasive, the government's action will be invalid under the Equal Protection Clause.[11]

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[10] Indeed, as Justice Stevens pointed out in his concurring opinion in *Cleburne*, the Court had to be "especially vigilant in evaluating the rationality of any classification involving a group that has been subjected to a 'tradition of disfavor [for] a traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification . . . .'" 473 U.S. at 453 n.6 .

[11] The finding included by Congress in the ADA -- that people with disabilities have been "subjected to a history of purposeful unequal treatment . . . based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society," 42 U.S.C. § 12101(a)(7) (1998) -- thus reflects the fact that disability shares certain qualities with race and gender. This finding does not contest the basis on which the *Cleburne* majority adopted the standard of review for governmental classifications based on disability: that is, the ongoing need for government to enact affirmative legislation with regard to people with disabilities. *See* 473 U.S. at 446.

B. There was a Pattern of Likely Unconstitutional Conduct on the Part of State and Local Governments Prior to Passage of the ADA.

The first version of the ADA was introduced on April 28, 1988.[12] The final version of the ADA was passed on July 12 and 13, 1990 (by the House of Representatives and the Senate, respectively).[13] During the twenty-six months in which the ADA was under active consideration by Congress, eighteen hearings were held by seven different committees.[14] The voluminous testimony addressed the range of adverse actions and negative attitudes that people with disabilities faced every day of their lives.[15]

The testimony Congress received gave it reason to believe that it was necessary to extend anti-discrimination requirements to all state and local governments. That is, evidence of the type of discrimination faced by people with disabilities across the board gave Congress reason to believe that state and local officials were engaging in activities that were likely unconstitutional under *Cleburne* and that required the intervention of passage of the ADA.

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[12] S. 2345, 100th Cong. (1988); H.R. 4498, 100th Cong. (1988).

[13] 136 CONG. REC. H4629-30 (daily ed. July 12, 1990); 136 CONG. REC. S9695 (daily ed. July 13, 1990).

[14] *See* STAFF OF HOUSE COMM. ON EDUC. AND LABOR, 101ST CONG., 2D SESS., LEGISLATIVE HISTORY OF PUB. L. NO. 101-336: THE AMERICANS WITH DISABILITIES ACT (Comm. Print 1990); *Americans with Disabilities Act of 1989: Hearings Before the Comm. on the Judiciary and the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong. (1989).

[15] *See* Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 418-420 (1991) (providing examples from ADA testimony).

While Congress considered evidence regarding discrimination in a range of areas, the information regarding employment is most relevant to the case now before the Court. In a report relied upon by Congress, the United States Commission on Civil Rights documented the great disparity in unemployment rates between those with disabilities and those without. *See* UNITED STATES COMMISSION ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 28 (1983). Further study indicated that in only a tiny fraction of the cases was this due to the inability of the person to perform his or her job. More often it was due to the prejudices and assumptions of the employer. Indeed, when given the chance, even individuals with severe disabilities have been found to have "excellent" work records. *Id.* at 30 (citing UNITED STATES CIVIL SERVICE COMMISSION, A CHAIN OF COOPERATION: SEVERELY PHYSICALLY DISABLED EMPLOYEES IN FEDERAL SERVICE 3 (1976)).

This discrimination extended beyond merely gaining employment. The Commission on Civil Rights' report documented that individuals with disabilities were more likely to work part-time (in spite of their ability to work a normal 40-hour week) and, at every educational level, earned less than their non-disabled coworkers. *Id.* at 31.[16] And again, these disparities could not be explained through differences in productivity. Studies dating back to the 1940s have consistently shown that, when placed in appropriate positions,

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[16] While this difference was largest among the lowest educational groups and among women (who sometimes earned only half of what the poorly-educated non-disabled did), it held true for every sex, educational, and racial grouping. *See* UNITED STATES COMMISSION ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 31-32 (1983) (citing Barbara Wolfe, *How the Disabled Fare in the Labor Market*, MONTHLY LAB. REV., Sept. 1980, at 51.).

individuals with disabilities are as productive, if not more so, than their non-disabled counterparts. *Id.* at 32.

In the many hearings it held on the ADA, Congress heard much of this evidence firsthand. For instance, it heard how a woman with controlled epilepsy was denied a job in Massachusetts because, although she was the most qualified candidate, the program director thought her seizures "would get in the way," *Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988: Hearing Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 100th Cong. 140 (1988) (statement of Sara Bloor), how a teacher was denied an elementary school credential because of paralysis in her legs, *see* S. REP. NO. 101-116, at 7 (1989), H.R. REP. NO. 101-485, pt. 2, at 29 (1990), and how a woman "'crippled by arthritis' was denied a job, not because she could not do the work but because 'college trustees [thought] normal students shouldn't see her.'" S. REP. NO. 101-116, at 7 (1989), H.R. REP. NO. 101-485, pt. 2, at 30 (1990). Clearly, in the employment sector, individuals with disabilities were being judged not on their merits, but on superficial appraisals of their productivity stemming from negative attitudes and stereotypes.

Congress was given no reason to believe that state and local managers who made employment decisions were immune from these general employer practices of inappropriately using disability as a proxy. Indeed, it would have been difficult to imagine why such managers, who are part of the same overall fabric of society as other employers, would have had radically different views of the qualifications of people with disabilities.[17]

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[17] The only possible reason might have been that, as representatives of government (albeit in their capacity as employers), such individuals might have felt more of a responsibility to treat people with disabilities based on their merits, rather than based on irrational stereotypes. In addition, the fact

The testimony Congress received indicated that state and local managers were not, in fact, acting any differently from their private sector counterparts. In 1989, Congress received a study entitled DISABILITY RIGHTS MANDATES: FEDERAL AND STATE COMPLIANCE WITH EMPLOYMENT PROTECTIONS AND ARCHITECTURAL BARRIER REMOVAL. This report was the result of the first area selected for study by the Advisory Commission on Intergovernmental Relations (ACIR). ACIR, DISABILITY RIGHTS MANDATES: FEDERAL AND STATE COMPLIANCE WITH EMPLOYMENT PROTECTIONS AND ARCHITECTURAL BARRIER REMOVAL iv (A-111, April 1989). A majority of the Commission's members were State and local officials. *Id.* at i.

The ACIR report concluded that both the federal government and state governments needed to improve their activities with regard to individuals with disabilities. In the area of employment, the report noted a relatively low percentage of people with disabilities employed by either state or federal agencies. *Id.* at 60-64. With regard to state employment, the report also surveyed officials in state agencies concerned with disability policy and services, and representatives of state-level advocacy groups, regarding impediments to employment. *Id.* at 70. Negative attitudes or misconceptions regarding people with disabilities were rated by 48% of the state government officials as a moderate impediment and by 35% as a strong impediment, while 37% of representatives of state advocacy groups rated these factors as a moderate impediment and 48% rated them as a strong impediment. *Id.* at 72, Table 6-10. Thus, 80-85% of both

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that many States had laws prohibiting discrimination in government employment based on disability might also have helped in that regard. Based on the evidence, however, neither of these reasons resulted in a significant change on the part of state and local managers. *See infra* pp. 18-20.

groups reported that negative attitudes were moderate to strong impediments to employment for people with disabilities.

The survey also included an open-ended question, in which respondents were asked to identify factors that made state compliance with existing employment mandates difficult. The Report concluded:

> State advocates and public officials expressed common themes in their open-ended remarks. Both reiterated the significant and often negative impact of public and employer attitudes towards people with disabilities. Such attitudes have multiple dimensions, including feelings of discomfort in associating with disabled individuals, inaccurate assessments of their productivity, and concerns about the cost that might be associated with workplace accommodations.
>
> Both groups expressed strong distress at the prominence of these attitudes and the difficulty in changing them. Negative attitudes persist, despite evidence that handicapped workers are productive, countless experiences with persons with disabilities who have made successful adjustments to work settings, and studies showing that most workplace accommodations involve little cost. *Id.* at 73.

Thus, from 1988 to 1990, Congress observed the following facts regarding the employment situation for people with disabilities. Employers, including state and local governmental managers, were using the fact of an individual's disability as a proxy for assuming that such individual would not be appropriate for employment. Use of disability in this manner as a proxy was not a benign, rational means of achieving other legitimate governmental interests (such as hiring productive, qualified workers). Rather, use of disability as a proxy in this

manner was based either on feelings of discomfort with people with disabilities, or on unjustified, irrational concerns regarding people with disabilities' lack of productivity that were based on stereotypes or stigma, rather than on reality.

In response to these facts, Congress passed the ADA. Given the evidence of continued irrational discrimination before Congress, it clearly was not sufficient that most States currently had laws prohibiting employment discrimination on the basis of disability, nor that the federal government also currently prohibited such discrimination in state programs that received federal funds. (Indeed, the ACIR report had been designed specifically to judge state and federal compliance with such mandates. *See id.* at iv.) The problem of state employment managers using disability inappropriately as a proxy gave Congress ample cause to believe that further action was necessary to effectuate the equal protection guarantee of the Fourteenth Amendment.

III. THE ADA WAS A CONGRUENT AND PROPORTIONATE RESPONSE TO LIKELY UNCONSTITUTIONAL STATE CONDUCT.

A. The ADA's Individualized Assessment and Burden of Proof Requirements are an Appropriate Response to Unconstitutional State Conduct

Petitioners point out that "the ADA requires individualized case-by-case determinations as to whether a disabled employee is qualified for the job . . . not 'generalizations' based on physical and mental capacity," that "the ADA places the burden of proof on States to justify their conduct . . . not the claimant," that "the ADA presumptively bars consideration of disability in providing public services or in employing civil servants," and that "the ADA requires an objective justification in a court of law." Pet. Br. at 42-43 (items 1-3 and 8) (citations omitted).

According to Petitioners, each of these requirements "contrasts with constitutional litigation at every turn." *Id.* at 42.

Petitioners are correct that the ADA requires that state employers engage in an individualized assessment of the qualifications of a person with a disability, rather than rely on broad generalizations. They are also correct that if an employer acknowledges it has used disability as a proxy for employment decisionmaking, the employer must provide some rational reason for that choice.

In many cases, under the ADA, the employer will prevail: for example, an employer could rationally choose to use blindness as a proxy for disqualification as a bus driver. In other cases, the employer will probably not prevail: for example, an employer could not use blindness as a proxy for disqualification to be a teacher without proffering some rational reason that was not based on a stereotype or not based on a lack of understanding of the capacity of blind people.

These requirements of the ADA, however, are appropriate mechanisms to ensure that state employees do not engage in unconstitutional behavior. State employers are constitutionally precluded, even under a rational basis standard of review, from simply adopting disability as a proxy for qualification without proffering some rational reason. *See Cleburne*, 473 U.S. at 446. It is, thus, legitimate for Congress to prophylactically preclude the possibility that disability will be inappropriately used as a proxy by mandating that employers engage in an individualized assessment of the qualifications of a person with a disability. Such a requirement ensures that qualification decisions will be based on merit and not on stereotypes and biases and, therefore, is a logical, congruent, and proportionate requirement to the constitutional prohibition that already applies to state employers.

It is also legitimate for Congress to place the burden on the employer to proffer a rational reason for taking an adverse employment action against an otherwise qualified person with a disability, once the person with the disability establishes a prima facie case that he or she is qualified and that disability was a motivating factor in the action. In such cases, the employer might demonstrate that disability was not the motivating factor in the employment action, or might demonstrate that the adverse action was rational -- that is, that the person's disability disqualified the individual from the job. In either case, however, placing some requirements on the employer is a legitimate prophylactic mechanism to ensure that disability is not inappropriately used as a proxy in employment decisions.

B. The ADA's Requirement of Reasonable Accommodations is an Appropriate Response to Unconstitutional State Conduct

Petitioners point out that "the ADA compels States to provide 'reasonable accommodation' for disabled employees unless it 'impose[s] an undue hardship,'" and that "the ADA compels States to make 'reasonable modifications' in their public services to accommodate the disabled unless they would 'fundamentally alter' the nature of the program." Pet. Br. at 42-43 (items 5-6) (citations omitted). Again, Petitioners assert that each of these requirements "contrasts with constitutional litigation at every turn." *Id.* at 42.

Petitioners do not explain, in any detail, why the reasonable accommodation requirements of the ADA are so far removed from constitutional obligations. Rather, they simply preface their list of ADA obligations with the assertion: "The rigorous standard of review applicable to an ADA action has no

parallel to the forgiving standard that the Court applies to equal protection claims." *Id.* at 41.[18]

In fact, the reasonable accommodation requirement of the ADA serves both a prophylactic and a remedial purpose that is congruent and proportionate to the underlying constitutional obligation. Under the Constitution, a state employer cannot use disability as a proxy for qualification without proffering some rational reason. One "rational" reason an employer may proffer is that employing people with disabilities will be too costly. For example, a state employer may attempt to justify its rule that "no blind people may be teachers" on the assertion that it will cost too much to provide readers for such individuals.

In reality, however, the employer may simply be using the cost concern as a pretext for not hiring individuals with whom the employer is uncomfortable or with regard to whom the employer simply feels, on a "gut level," are not qualified.[19] Establishing a legal reasonable accommodation requirement thus serves a pivotal prophylactic purpose. Once an employer must engage in a good-faith dialogue with a blind applicant or employee to determine what accommodations are actually necessary and what they actually cost (for example, the advent of new technology may obviate the need for readers and be cost-effective), the employer is precluded from using cost as a simple pretextual reason to justify the use of disability as a proxy.

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[18] Earlier in the brief, Petitioners also assert: "These disparate-effect and reasonable-accommodation requirements [of the ADA] far exceed the minimal strictures of rational-basis review." Pet. Br. at 29. There is no detailed analysis, however, as to why a reasonable accommodation requirement is so far removed from the equal protection guarantee of the Fourteenth Amendment.

[19] *See, e.g.*, S. REP. NO. 101-116, at 10 (1989) (costs of accommodation are frequently exaggerated); H.R. REP. NO. 101-485, pt. 2, at 34 (1990) (same).

Nor is the ultimate burden on state employers incongruent with their constitutional obligations, given the "undue hardship" limitation in the law. 42 U.S.C. § 12112(b)(5)(A) (1998). There may well be situations where the cost of accommodating an employee will be quite significant, in light of the resources available to the employer. But it is precisely in those situations that the ADA provides the employer a defense to the reasonable accommodation obligation. *See id.*

Requiring reasonable accommodations is also a congruent and proportionate remedial measure. Numerous studies have demonstrated that an effective means of reducing attitudes of discomfort, stigma, false stereotypes, and pity regarding people with disabilities is to enhance the interaction between people with disabilities and people without disabilities.[20] Indeed, the very reason many myths and stereotypes exist regarding the incapacity of people with disabilities to work is because people with disabilities have been prevented from demonstrating their true capacity in the employment arena.[21]

But interaction in the workplace is difficult to ensure without some remedial actions. The reality is that societal decisions have been made as if people with disabilities were not part of our societal makeup. Thus, we have built buildings with steps, rather than ramps; we have manufactured telephones without built-in amplifiers; and we have created work schedules and rules that do not accommodate people with

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[20] *See, e.g.*, Myron G. Eisenberg, *Disability as Stigma*, DISABLED PEOPLE AS SECOND-CLASS CITIZENS 3 (Myron G. Eisenberg et al. eds., 1982); C. R. Schneider & W. Anderson, *Attitudes Toward the Stigmatized: Some Insights from Recent Research*, 23 REHABILITATION COUNSELING BULL. 299, 300 (1980); H. Hahn, *Paternalism and Public Policy*, SOC. SCI. & MOD. SOC'Y, Mar./Apr. 1983, at 46.

[21] *See, e.g.*, J. Gliedman & W. Roth, *Handicap as a Social Construction*, in THE UNEXPECTED MINORITY: HANDICAPPED CHILDREN IN AMERICA 22 (1980).

significant medical problems. Each of these decisions, and hundreds of other minor and major societal decisions, have operated to foreclose employment and social opportunities for people with disabilities.

It is impracticable to assume that people with disabilities can become integrated into the mainstream of American society if the barriers that society has erected against such participation are not obviated through some affirmative modifications. The reasonable accommodation requirement of the ADA thus serves a pivotal remedial function. In order to break down the discomfort, stigma, stereotypes, and pity that have given rise to the unconstitutional actions of irrationally using disability in the first place, it is legitimate for Congress to mandate those remedial actions (subject to the "undue hardship" and "undue burden" limitations[22]) that can assist in the integration of people with disabilities into American society.

C. The ADA's Disparate Impact Requirement, Which is Best Understood as a Qualification Standard or a Reasonable Accommodations Requirement, is an Appropriate Response to Unconstitutional State Conduct

Petitioners note that the ADA "prohibits any rule or practice that has a disparate impact unless the State can prove that it is 'job-related' and 'consistent with business necessity,'" that "employment standards amount to impermissible conduct if they 'have the effect of discrimination' or 'tend to screen out' disabled individuals," and that "the ADA frequently requires proof that there is no acceptable alternative with less discriminatory impact." Pet. Br. at 42-43 (items 3, 7, and 9) (citations omitted). Again, Petitioners assert that each of these

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[22] 42 U.S.C. §§ 12112(b)(5)(A), 12182(b)(2)(A)(iii) (1998).

requirements "contrasts with constitutional litigation at every turn." *Id.* at 42.

Petitioners are, of course, correct that neutral governmental actions that have the effect of discrimination are not directly prohibited by the Constitution. *See Washington v. Davis*, 426 U.S. 229 (1976); *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979). But the specific actions prohibited by the ADA are appropriate prophylactic and remedial mechanisms to ensure that governmental actions based on irrational prejudice, which *are* prohibited by the Constitution, are prevented or remedied.

In practice, most "disparate impact" claims under the ADA are applications of either the qualifications standard requirement of the ADA, 42 U.S.C. § 12113(a), or the reasonable accommodation requirement, § 12112(b)(5)(A). Disparate impact cases under Title VII of the Civil Rights Act of 1964 often contest neutral rules, such as educational requirements or height or strength requirements, that do not target race or gender in any manifest manner, but nonetheless have a disproportionate effect on a particular race or gender. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Johnson v. Pike Corp. of Am.*, 332 F. Supp. 490 (C.D. Cal. 1971). By contrast, in ADA cases, the "neutral rule" is often a qualification standard, such as a strength or endurance requirement, that disqualifies some people with disabilities in a very straightforward manner. *See, e.g., Hunter v. Pennsylvania Dep't of Corrections*, 42 F. Supp.2d 542 (E.D. Pa. 1999).

The ADA does not preclude employers from having such qualification standards. Indeed, many jobs rationally require physical standards. Rather, the ADA requires that the qualification standard be "job-related and consistent with business necessity"-- that is, that the physical standard actually be rationally related to the job. 42 U.S.C. § 12113(a) (1998).

In some cases, the challenge to the neutral rule takes the form of a reasonable accommodation request. An employer may have a job-related requirement that applies to everyone, but which makes it impossible for even an otherwise *qualified* individual to perform the job. For example, a state may have a requirement that all applicants for teaching jobs must take a written test. A blind individual, who is otherwise qualified to be a teacher, would be precluded by this job-related "neutral policy" from becoming a teacher.

Under the ADA, the employer can continue to have a job-related neutral policy that applies to all applicants and employees. However, the employer also must ensure that a modification is made to the neutral policy if doing so would allow a person with a disability to obtain or perform a job. The employer need not, however, make any modification that would fundamentally alter the nature of the job or would otherwise constitute an undue hardship. *See* 42 U.S.C. § 12112(b)(5)(A) (1998).

Congress understood that neutral rules -- either in the form of physical qualification standards or in the form of job-related policies -- often masked, or operated in tandem with, prejudices, fear, stigma, and discomfort that characterized employer attitudes towards people with disabilities. As the Senate Committee Report to the ADA explained:

> [T]he ADA adopts a framework for employment selection procedures which is designed to assure that persons with disabilities are not excluded from job opportunities unless they are actually unable to do the job . . . . As was made strikingly clear at the hearings on the ADA, stereotypes and misconceptions about the abilities, or more correctly the inabilities, of persons with disabilities are still pervasive today. Every government and private study on the issue has shown that employers disfavor hiring persons

> with disabilities because of stereotypes, discomfort, misconceptions, and unfounded fears about increased costs and decreased productivity.
>
> *The three pivotal provisions* to assure a fit between job criteria and an applicant's actual ability to do the job are:
>
> (1) The requirement that persons with disabilities not be disqualified because of the inability to perform non-essential or marginal functions of the job;
>
> (2) The requirement that any selection criteria that screen out or tend to screen out be job-related and consistent with business necessity; and
>
> (3) The requirement to provide resonable [sic] accommodation to assist persons with disabilities to meet legitimate criteria.
>
> These three legal requirements, which are incorporated in sections 102(b)(5) and (7) of the legislation, *work together to provide a high degree of protection to eliminate the current pervasive bias against employing persons with disabilities in the selection process*. S. REP. NO. 101-116, at 37 (1989) (emphasis added).

Obviously, not every physical qualification standard or job-related neutral policy is adopted by an employer to mask, or to work in tandem with, unconstitutional conduct on the part of the employer. But based on the evidence found by Congress, and recorded in the testimony and committee reports, there was, and there continues to be, a "pervasive bias" against employing people with disabilities that contravenes constitutional obligations. *Id.* In light of such a record, Congress could legitimately adopt the prophylactic and remedial mechanism of requiring that physical qualification standards be justified, and that reasonable accommodations be

made to job-related neutral policies, in order to both prevent and remedy such unconstitutional conduct.

IV. UPHOLDING CONGRESSIONAL POWER TO ENACT THE ADA IS CONSISTENT WITH THE COURT'S RECENT DECISIONS AND WILL NOT THREATEN PRINCIPLES OF FEDERALISM.

Petitioners observe that "a decision upholding the prophylactic exercise of section 5 power in the context of rational-basis scrutiny, with no widespread practice of relevant constitutional violations to boot, would break new ground and do little 'to allay lingering concerns about the extent of national power.'" Pet. Br. at 47 (citing *Alden v. Maine*, 527 U.S. 706, 713-14 (1999). Petitioners argue:

> Such authority simply has no stopping point. Virtually any Federal law that is itself rational could fairly be said to curb the risk of irrational State lawmaking in the area . . . Many questions linger here, and the answers to all of them counsel against accepting the invitation to start down this precipitous path. Pet. Br. at 47-48

As Petitioners' statement indicates, however, there is a natural stopping point to Congress' power. A decision to uphold the prophylactic exercise of section 5 power in the context of rational-basis scrutiny, "*with no widespread practice of relevant constitutional violations to boot*," Pet. Br. at 47 (emphasis added), would certainly be breaking new ground. Indeed, it would constitute a reversal of several recent Supreme Court decisions. *See, e.g., Kimel*, 120 S. Ct. 631; *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999); *City of Boerne*, 521 U.S. 507 (1997).

But *amici's* argument is premised on the fact that the ADA was passed against the backdrop of a "widespread practice of relevant constitutional violations" on the part of state actors. Pet. Br. at 47. Under the Court's equal protection jurisprudence with regard to disability, Congress had substantial evidence that state and local actors were likely engaging in unconstitutional conduct and that the ADA was a congruent and proportionate response to that conduct. *See supra* pp. 6-30.

Based on the Court's recent decisions, the Court itself holds and guides the reins that restrain Congress' power. Because the States' sovereign immunity may be abrogated only when Congress acts pursuant to section 5 of the Fourteenth Amendment, *see Seminole Tribe*, 517 U.S. 44,[23] and because Congress may not legislate far afield from the contours of the Fourteenth Amendment as established by the Supreme Court, *see City of Boerne*, 521 U.S. 507, a natural stopping point to Congress' power has been established by the Court.

A decision in this case that Congress acted within its authority when it abrogated States' sovereign immunity under the ADA would not open the floodgates for Congress to enact any law that abrogates States' sovereign immunity. To the contrary, it will stand for the simple proposition that -- in the case of the ADA -- Congress correctly took note of likely unconstitutional conduct on the part of the States, and passed a congruent and proportional statute in response.

CONCLUSION

For the reasons set forth above, the decision below should be affirmed.

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[23] States may also consent to conditions when they accept federal funds, *see, e.g., South Dakota v. Dole*, 483 U.S. 203 (1987), but such a waiver of sovereign immunity is not at issue in this case.

Respectfully submitted,

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APPENDIX

APPENDIX

BIOGRAPHIES OF *AMICI CURIAE*

Senator Robert Dole served as the Republican Senator from Kansas from 1969 to 1996. During that time, he served as the Majority and Minority Leader in the Senate and was an original co-sponsor of the ADA. Senator Dole was a leader in the negotiations that led to the passage of the ADA.

Senator Tom Harkin is the Democratic Senator from Iowa and has served in the Senate since 1985. Senator Harkin was the chief sponsor of the ADA in the Senate and chair of the former Disability Policy Subcommittee of the Senate Labor and Human Resources Committee. In these roles, Senator Harkin was a leader in the negotiations that resulted in the ADA's passage.

Senator Orrin Hatch has served as the Republican Senator from Utah since 1977 and was ranking minority member of the Senate Committee on Labor and Human Resources from 1987 to 1992. Senator Hatch was a principal in the negotiations concerning the ADA.

Senator Jim Jeffords is the Republican Senator from Vermont and the chairman of the Senate Health, Education, Labor and Pensions Committee. In 1988, while serving as ranking member of the House Education and Labor Committee, Congressman Jeffords helped introduce the first version of the ADA. When he moved to the Senate in 1989, Jeffords became an original co-sponsor of the second version of the ADA and worked towards its passage.

Senator Edward Kennedy is the senior Democratic Senator from Massachusetts and has served in the Senate since 1963. From 1987 to 1994, Senator Kennedy chaired the Senate Labor and Human Resources Committee. In 1989, Senator Kennedy, together with Senator Tom Harkin and 32 other Senators introduced the second version of the ADA. Since 1995, Senator Kennedy has been the ranking minority member of the Health, Education, Labor, and Pensions Committee. Senator Kennedy was actively involved in the negotiations and compromises that resulted in passage of the ADA.

Congressman Steve Bartlett was the Republican Representative from the 3rd district of Texas from 1983 to 1991. From 1989 to 1990, Congressman Bartlett was the ranking minority member on the Subcommittee on Select Education of the House Education and Labor Committee. Congressman Bartlett was an original co-sponsor of the ADA and in the Fall of 1989, at the request of the Republican House leadership, Congressman Bartlett was active in negotiations on the ADA that resulted in its passage by the House Education and Labor Committee and, ultimately, by Congress.

Congressman Steny Hoyer is the Democratic Representative from the 5th district of Maryland. Congressman Hoyer was chairman of the House Democratic Caucus from 1989 to 1994. From 1989 to 1990, Congressman Hoyer led or participated in negotiations on the ADA on behalf of the Democratic House leadership as the bill passed through four House committees.

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IN THE
Supreme Court of the United States

UNIVERSITY OF ALABAMA AT BIRMINGHAM, BOARD OF TRUSTEES, *et al.*,
Petitioners,

v.

PATRICIA GARRETT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

STATEMENT OF FORMER PRESIDENT GEORGE H.W. BUSH AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF FORMER PRESIDENT GEORGE H.W. BUSH AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS[1]

INTEREST OF *AMICUS CURIAE*

As the President who pressed for the enactment of the Americans with Disabilities Act ("ADA") and signed it into law, I have a direct and personal interest in the defense of the ADA and the preservation of the important safeguards it provides to disabled Americans.

STATEMENT

On July 26, 1990, I had the privilege and honor of signing into law the ADA, comprehensive civil rights legislation intended to signal the end to unjustified segregation and exclusion of persons with disabilities from mainstream American life. *See Statement on Signing the Americans with Disabilities Act of 1990*, 2 Pub. Papers 1070, 1071 (July 26, 1990) ("*ADA Signing Statement*") (App. 3a). With the signing of the ADA, every man, woman, and child with a disability could pass through once-closed doors into a bright new era of equality, independence, and freedom. *See Remarks on Signing the Americans with Disabilities Act of 1990*, 2 Pub. Papers 1067, 1068 (July 26, 1990) ("*ADA Signing Remarks*") (App. 6a).

July 26, 1990 was a landmark occasion for me and for all Americans because, with the signing of the ADA, our country made an unequivocal statement to the world that Americans will not accept, will not excuse, and will not tolerate discrimination against persons with disabilities. *See*

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[1] Letters from the parties consenting to the filing of this statement are on file with the Clerk of the Court. No counsel for a party authored this statement in whole or in any part. No one other than Former President George H.W. Bush and his counsel made a monetary contribution to the preparation or submission of this statement.

ADA Signing Remarks at 1069 (App. 10a). The ADA works because it embodies what must be at the heart of all civil rights struggles—the spirit of inclusiveness, the devotion to individual rights, and equal opportunity. *See Remarks Commemorating the First Anniversary of the Signing of the Americans with Disabilities Act of 1990*, 2 Pub. Papers 963, 964 (July 26, 1991) (App. 12a). It ensures that no disabled American will ever again be deprived of the basic guarantee of life, liberty, and the pursuit of happiness. *See ADA Signing Remarks* at 1068 (App. 7a).

The ADA was enacted to address discrimination against persons with disabilities that permeated our society, including discrimination by public agencies in such areas as employment and the delivery of public services. *See ADA Signing Statement* at 1070 (App. 1a); *Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong. 808-09, 815-17 (1989) (prepared statement of Hon. Richard L. Thornburgh, Attorney General of the United States) ("*Thornburgh Senate Statement*") (App. 16a-17a, 22a-23a); *Americans with Disabilities Act of 1990: Hearings on H.R. 2273 Before the House Comm. on the Judiciary and the Subcomm. on Civil and Constitutional Rights*, 101st Cong. 198-99, 206-07 (1989) (prepared statement of Attorney General Thornburgh) ("*Thornburgh House Statement*") (App. 27a, 32a-33a).

In 1986, I personally accepted, on behalf of President Reagan, a report from the National Council on Disability ("NCD") entitled "Toward Independence." NCD is a congressionally established Council. All 15 members of the Council at that time had been appointed by President Reagan. *See ADA Signing Statement* at 1070 (App. 1a).

The report recommended enactment of comprehensive legislation to ban discrimination against persons with disabilities. *See id.* Specifically, NCD found that historically society has tended to segregate and isolate

individuals with disabilities, and despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.

NCD also found that discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.

Further, NCD found that unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, or religion, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination. The NCD findings, among others, are incorporated in Section 2 of the ADA, 42 U.S.C. § 12101.

My decision to embrace the ADA was based on two key factors. First, the comprehensive character of the legislation was a significant factor. *See ADA Signing Statement* at 1070 (App 1a). Given the pervasive nature of discrimination faced by individuals with disabilities and the wide range of barriers faced by such individuals in such areas as employment and public services, it was critical that the legislation be comprehensive and cover both public and private entities. *See Thornburgh Senate Statement* (App. 16a *passim*); *Thornburgh House Statement* (App. 26a *passim*).

My Administration recognized that then-existing civil rights laws were inadequate. For example, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, only covered recipients of federal assistance. It did not cover services provided by public agencies that did not receive federal aid.

Thus, Section 504 left broad areas of disability discrimination untouched or inadequately addressed. Many persons with disabilities in this nation still lived in an intolerable state of isolation and dependence. In 1990,

despite the existence of laws such as Section 504 of the Rehabilitation Act, persons with disabilities were still too often shut out of the economic and social mainstream of American life. The unreasonable failure to eliminate attitudinal, architectural, and communication barriers in employment, transportation, public accommodations, public services and telecommunications denies persons with disabilities an equal opportunity to contribute to and benefit in a meaningful way from the richness of American society. *See ADA Signing Statement* at 1070 (App. 1a-2a); *Thornburgh Senate Statement* at 809 (App. 17a); *Thornburgh House Statement* at 198-99 (App. 26a-27a).

In the 20 years preceding the enactment of the ADA, civil rights legislation protecting disabled persons had been enacted in a piecemeal fashion. Thus, federal laws prior to the ADA were like a patchwork quilt in need of repair. There were holes in the fabric—serious gaps in coverage that left persons with disabilities without adequate civil rights protections. To be effective in addressing the pervasive discrimination by public agencies, among others, the ADA needed to be cohesive, coordinated, and comprehensive. *See Thornburgh Senate Statement* at 812 (App. 19a-20a); *Thornburgh House Statement* at 201 (App. 28a-29a).

Second, the ADA was modeled on existing federal civil rights laws prohibiting discrimination on the basis of disability. These laws, such as Section 504, have proven to provide the proper balance between the rights of persons with disabilities and the legitimate concerns of covered entities. The ADA also used as its model the panoply of civil rights laws prohibiting discrimination on the basis of race, color, national origin, religion, and sex. *See Thornburgh Senate Statement* at 810, 813-15, 818 (App. 17a-18a, 20a-22a, 24a-25a); *Thornburgh House Statement* at 201-03 (App. 29a-30a).

In conclusion, I recognize that no single piece of legislation can alone change longstanding perception or

misperceptions; regrettably, attitudes can only be reshaped gradually. One of the keys to this reshaping process, however, is to increase contact between and among people with disabilities and their nondisabled peers. And an essential component of that effort was the enactment of a comprehensive law that promotes the integration of people with disabilities into all aspects of American life, including our workplaces, our communities, and our schools and other public services. *See Thornburgh Senate Statement* at 819 (App. 25a); *Thornburgh House Statement* at 212 (App. 36a).

Respectfully submitted,

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APPENDICES

APPENDIX A

[2 Pub. Papers 1070 (July 26, 1990)]

[Page 1070]

* * * *

STATEMENT BY THE PRESIDENT ON SIGNING THE AMERICANS WITH DISABILITIES ACT OF 1990

July 26, 1990

Today, I am signing S. 933, the "Americans with Disabilities Act of 1990." In this extraordinary year, we have seen our own Declaration of Independence inspire the march of freedom throughout Eastern Europe. It is altogether fitting that the American people have once again given clear expression to our most basic ideals of freedom and equality. The Americans with Disabilities Act represents the full flowering of our democratic principles, and it gives me great pleasure to sign it into law today.

In 1986, on behalf of President Reagan, I personally accepted a report from the National Council on Disability entitled "Toward Independence." In that report, the National Council recommended the enactment of comprehensive legislation to ban discrimination against persons with disabilities. The Americans with Disabilities Act (ADA) is such legislation. It promises to open up all aspects of American life to individuals with disabilities — employment opportunities, government services, public accommodations, transportation, and telecommunications.

This legislation is comprehensive because the barriers faced by individuals with disabilities are wide-ranging. Existing laws and regulations under the Rehabilitation Act of 1973 have been effective with respect to the Federal

Government, its contractors, and the recipients of Federal funds. However, they have left broad areas of American life untouched or inadequately addressed. Many of our young people, who have benefited from the equal educational opportunity guaranteed under the Rehabilitation Act and the Education of the Handicapped Act, have found themselves on graduation day still shut out of the mainstream of American life. They have faced persistent discrimination in the workplace and barriers posed by inaccessible public transportation, public accommodations, and telecommunications.

Fears that the ADA is too vague or too costly and will lead to an explosion of litigation are misplaced. The Administration worked closely with the Congress to ensure that, wherever possible, existing language and standards from the Rehabilitation Act were incorporated into the ADA. The Rehabilitation Act standards are already familiar to large segments of the private sector that are either Federal contractors or recipients of Federal funds. Because the Rehabilitation Act was enacted 17 years ago, there is already an extensive body of law interpreting the requirements of that Act. Employers can turn to these interpretations for guidance on how to meet their obligations under the ADA.

The Administration and the Congress have carefully crafted the ADA to give the business community the flexibility to meet the requirements of the Act without incurring undue costs. Cost may be taken into account in determining how an employee is **[Page 1071]** "reasonably accommodated," whether the removal of a barrier is "readily achievable," or whether the provision of a particular auxiliary aid would result in an "undue burden." The ADA's most rigorous access requirements are reserved for new construction where the added costs of accessible features are minimal in relation to overall construction costs. An elevator exemption is provided for many buildings.

The careful balance struck between the rights of individuals with disabilities and the legitimate interests of business is shown in the various phase-in provisions in the ADA. For example, the employment provisions take effect 2 years from today for employers of 25 or more employees. Four years from today that coverage will be extended to employers with 15-24 employees. These phase-in periods and effective dates will permit adequate time for businesses to become acquainted with the ADA's requirements and to take the necessary steps to achieve compliance.

The ADA recognizes the necessity of educating the public about its rights and responsibilities under the Act. Under the ADA, the Attorney General will oversee Government-wide technical assistance activities. The Department of Justice will consult with the Architectural and Transportation Barriers Compliance Board, the Equal Employment Opportunity Commission, the Department of Transportation, the Federal Communications Commission, the National Council on Disability, and the President's Committee on Employment of People with Disabilities, among others, in the effort. We will involve trade associations, advocacy groups, and other similar organizations that have existing lines of communications with covered entities and persons with disabilities. The participation of these organizations is a key element in assuring the success of the technical assistance effort.

In signing this landmark bill, I pledge the full support of my Administration for the Americans with Disabilities Act. It is a great honor to preside over the implementation of the responsibilities conferred on the executive branch by this Act. I pledge that we will fulfill those responsibilities efficiently and vigorously.

The Americans with Disabilities Act presents us all with an historic opportunity. It signals the end to the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life. As the Declaration of

Independence has been a beacon for people all over the world seeking freedom, it is my hope that the Americans with Disabilities Act will likewise come to be a model for the choices and opportunities of future generations around the world.

GEORGE BUSH

THE WHITE HOUSE,
July 26, 1990.

APPENDIX B

[2 Pub. Papers 1067 (July 26, 1990)]

[Page 1067]

* * * *

REMARKS ON SIGNING THE AMERICANS WITH DISABILITIES ACT OF1990

July 26, 1990

Evan, thank you so much. And welcome to every one of you, out there in this splendid scene of hope, spread across the South Lawn of the White House. I want to salute the Members of the United States Congress, the House and the Senate who are with us today – active participants in making this day come true. This is, indeed, an incredible day especially for the thousands of people across the Nation who have given so much of their time, their vision, and their courage to see this act become a reality.

You know, I started trying to put together a list of all the people who should be mentioned today. But when the list started looking a little longer than the Senate testimony for the bill, I decided I better give up, or that we'd never get out of here before sunset. So, even though so many deserve credit, I will single out but a tiny handful. And I take those who have guided me personally over the years:

Of course, my friends Evan Kemp and Justin Dart, up here on the platform with me; and of course I hope you'll forgive me for also saying a special word of thanks to two from the White House, but again, this is personal, so I don't want to offend those omitted. Two from the White House

Boyden Gray and Bill Roper, who labored long and hard. And I want to thank Sandy Parrino, of course, for her leadership. And I again — it is very risky with all these members of Congress here who worked so hard, but I can say on a very personal basis, Bob Dole has inspired me.

This is an immensely important day, a day that belongs to all of you. Everywhere I **[Page 1068]** look, I see people who have dedicated themselves to making sure that this day would come to pass: My friends from Congress, as I say, who worked so diligently with the best interest of all at heart, Democrats and Republicans, members of this administration – and I'm pleased to see so many top officials and members of my Cabinet here today who brought their caring and expertise to this fight; and then, the organizations – so many dedicated organizations for people with disabilities, who gave their time and their strength; and perhaps most of all, everyone out there and others – across the breadth of this nation are 43 million Americans with disabilities. You have made this happen. All of you have made this happen. To all of you, I just want to say your triumph is that your bill will now be law, and that this day belongs to you. On behalf of our nation, thank you very, very much.

Three weeks ago we celebrated our nation's Independence Day. Today we're here to rejoice in and celebrate another "independence day," one that is long overdue. With today's signing of the landmark Americans for Disabilities Act, every man, woman, and child with a disability can now pass through once-closed doors into bright new era of equality, independence, and freedom. As I look around at all these joyous faces, I remember clearly how many years of dedicated commitment have gone into making this historic new civil rights act a reality. It's been the work of a true coalition a strong and inspiring coalition of people who have shared both a dream and a passionate determination to make that dream come true. It's been a coalition in the finest spirit, a joining of Democrats and

Republicans, of the legislative and the executive branches, of Federal and State agencies, of public officials and private citizens, of people with disabilities and without.

This historic Act is the world's first comprehensive declaration of equality for people with disabilities, the first. Its passage has made the United States the international leader on this human rights issue. Already, leaders of several other countries, including Sweden, Japan, the Soviet Union, and all 12 members of the EEC, have announced that they hope to enact now similar legislation.

Our success with this Act proves that we are keeping faith with the spirit of our courageous forefathers who wrote in the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights." These words have been our guide for more than two centuries as we've labored to form our more perfect union. But tragically, for too many Americans, the blessings of liberty have been limited or even denied. The Civil Rights Act of '64 took a bold step towards righting that wrong. But the stark fact remained that people with disabilities were still victims of segregation and discrimination, and this was intolerable. Today's legislation brings us closer to that day when no Americans will ever again be deprived of their basic guarantee of life, liberty, and the pursuit of happiness.

This Act is powerful in its simplicity. It will ensure that people with disabilities are given the basic guarantees for which they have worked so long and so hard: independence, freedom of choice, control of their lives, the opportunity to blend fully and equally into the rich mosaic of the American mainstream. Legally, it will provide our disabled community with a powerful expansion of protections and then basic civil rights. It will guarantee fair and just access to the fruits of American life which we all must be able to enjoy. And then, specifically, first the ADA ensures that employers covered by the act cannot discriminate against qualified individuals with

disabilities. Second, the ADA ensures access to public accommodations such as restaurants, hotels, shopping centers, and offices. And third, the ADA ensures expanded access to transportation services. And fourth, the ADA ensures equivalent telephone services for people with speech or hearing impediments.

These provisions mean so much to so many. To one brave girl in particular, they will mean the world. Lisa Carl, a young Washington State woman with cerebral palsy, who I'm told is with us today, now **[Page 1069]** will always be admitted to her hometown theater. Lisa, you might not have been welcome at your theater, but I'll tell you — welcome to the White House. We're glad you're here. The ADA is a dramatic renewal not only for those with disabilities but for all of us, because along with the precious privilege of being an American comes a sacred duty — to ensure that every other American's rights are also guaranteed.

Together, we must remove the physical barriers we have created and the social barriers that we have accepted. For ours will never be a truly prosperous nation until all within it prosper. For inspiration, we need look no further than our own neighbors. With us in that wonderful crowd out there are people representing 18 of the daily Points of Light that I've named for their extraordinary involvement with the disabled community. We applaud you and your shining example. Thank you for your leadership for all that are here today.

Now, let me just tell you a wonderful story, a story about children already working in the spirit of the ADA, a story that really touched me. Across the Nation, some 10,000 youngsters with disabilities are part of Little League's Challenger Division. Their teams play just like others, but — and this is the most remarkable part — as they play, at their sides are volunteer buddies from conventional Little League teams. All of these players work together. They team up to wheel around the bases and to field grounders together and,

most of all, just to play and become friends. We must let these children be our guides and inspiration.

I also want to say a special word to our friends in the business community. You have in your hands the key to the success of this Act, for you can unlock a splendid resource of untapped human potential that, when freed, will enrich us all. I know there have been concerns that the ADA may be vague or costly, or may lead endlessly to litigation. But I want to reassure you right now that my administration and the United States Congress have carefully crafted this Act. We've all been determined to ensure that it gives flexibility, particularly in terms of the timetable of implementation, and we've been committed to containing the costs that may be incurred.

This Act does something important for American business, though and remember this: You've called for new sources of workers. Well, many of our fellow citizens with disabilities are unemployed. They want to work, and they can work, and this is a tremendous pool of people. And remember this is a tremendous pool of people who will bring to jobs diversity, loyalty, proven low turnover rate, and only one request: the chance to prove themselves. And when you add together Federal, State, local, and private funds, it costs almost $200 billion annually to support Americans with disabilities – in effect, to keep them dependent. Well, when given the opportunity to be independent, they will move proudly into the economic mainstream of American life, and that's what this legislation is all about.

Our problems are large, but our unified heart is larger. Our challenges are great, but our will is greater. And in our America, the most generous, optimistic nation on the face of the earth, we must not and will not rest until every man and woman with a dream has the means to achieve it.

And today, America welcomes into the mainstream of life all of our fellow citizens with disabilities. We embrace

you for your abilities and for your disabilities, for our similarities and indeed for our differences, for your past courage and your future dreams. Last year, we celebrated a victory of international freedom. Even the strongest person couldn't scale the Berlin Wall to gain the elusive promise of independence that lay just beyond. And so, together we rejoiced when that barrier fell.

And now I sign legislation which takes a sledgehammer to another wall, one which has for too many generations separated Americans with disabilities from the freedom they could glimpse, but not grasp. Once again, we rejoice as this barrier falls for claiming together we will not accept, we will not excuse, we will not tolerate discrimination in America.

With, again, great thanks to the Members of the United States Senate, leaders of whom are here today, and those who worked so tirelessly for this legislation on both sides of the aisles. And to those Members of the House of Representatives with **[Page 1070]** us here today, Democrats and Republicans as well, I salute you. And on your behalf, as well as the behalf of this entire country, I now lift my pen to sign this Americans with Disabilities Act and say: Let the shameful wall of exclusion finally come tumbling down. God bless you all.

APPENDIX C

[2 Pub. Papers 963 (July 26, 1991)]

[Page 963]

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REMARKS COMMEMORATING THE FIRST ANNIVERSARY OF THE SIGNING OF THE AMERICANS WITH DISABILITIES ACT OF 1990

July 26, 1991

First, may I greet the distinguished members of Congress here in the front rows, thank them for coming, thank them for their interest in the passage of this important legislation we're here to celebrate today, but also in their interest in following up on it. May I greet, also, the Attorney General Dick Thornburgh, and our Secretary of HHS Lou Sullivan and the Vice President, of course. He and I welcome you to the Rose Garden. And may I salute the other guests that are with us. And a special thanks today to the men and women from our business community. American corporations, you see, are a vital part of this team, and your support of the ADA is critical to its success.

One year ago, I stood over there — many of you present — on the South Lawn. And I will never, literally, never forget that sight or certainly the emotional feeling I felt on that day. Thousands of people from across the country had come to celebrate the signing of the Americans with Disabilities Act, one of the most comprehensive civil rights bills in the history of this country. And while people felt a justifiable sense of triumph last year, you also could see a feeling of eager impatience. After all, the signing of the

ADA didn't mark the end of a long struggle, it marked, really, a beginning.

Some of you here today joined me on the South Lawn, as I mentioned, a year ago, and we've made tremendous advances since that ceremony. We've introduced changes that will transform people's worlds. The ADA has also helped us, all of us, to understand a little bit more about ourselves. It reminds us that along with the privilege of being an American comes a duty to recognize and defend the rights of every American.

This bill does more than make the American dream of equality a reality for 43 million Americans with disabilities. It offers, in a sense, fresh testimony to our Nation's greatness. It demonstrates how we can advance the cause of civil rights. It shows what can happen when we work together, drawing upon the fundamental decency of the American people.

The quest for civil rights is not a zero-sum game. It shouldn't mean advancing some at the expense of others. The quest **[Page 964]** for civil rights is a quest for individual rights and equal opportunity and it's a crusade to throw open the doors of opportunity and tear down the walls of bigotry.

The ADA works because it calls upon the best in the American people, and then Americans respond. It works because it embodies what must be at the heart of all civil rights struggles: the spirit of inclusiveness, the devotion to individual rights and equal opportunity. That devotion runs deep in our Nation. We are the land of opportunity and always have been.

Our Constitution and our courts pledge equal protection under the law. But equally important, our people believe in legal equality. And many try to broaden opportunity in little ways, by reaching out to capable people and giving them a chance, giving them a fair chance.

America must be a country where the sons and daughters of poverty have the same grasp on the American dream as the children of privilege. And it must be a land where a child can overcome any obstacle and fulfill his or her own potential.

We see this promise fulfilled by a man I presented to this nation 4 weeks ago. And we can be proud to live in a country whose highest Court will include a man who understands the importance of basic American values: tolerance, industry, and decency. And I'm speaking, of course, of my nominee to the Court, Clarence Thomas.

While Judge Thomas was at the EEOC, he compiled an excellent record on disability issues, with which I hope all of you are familiar. But his life illustrates the principle that inspires all civil rights bills, the principle that we must throw open the doors of opportunity to everyone. And this spirit should guide us as we pursue all civil rights legislation, for our greatest strength lies in our ability to work together and honor the shared values we treasure.

We have worked together this last year. And in so doing, we've understood more fully just how much people with disabilities have to offer. We've demonstrated that social progress includes economic growth and that both play essential roles in the in the American dream. Businesses support the ADA because it gives everyone a chance to be productive in the workplace. It broadens our economic mainstream. It enables society to benefit from the wisdom, energy and industry of people who want just one thing, a fair chance.

And while we've made a strong start, we have much to do. As long as the doors of opportunity are closed to even one American, we must keep working at it.

The passage of the ADA, the world's first declaration of equality for people with disabilities, made this country the international leader on this human rights issue. And now the

world is watching to see how we use this act, how we remove the physical barriers we've created and the social barriers that we've accepted. Our success or failure in keeping the promise of the ADA will affect the lives of hundreds of millions of people with disabilities, not just here in the United States but throughout the world.

Our challenges remain great, but our will is even greater. In America – the most generous, optimistic nation on the face of the earth – we will not rest until every man and woman and child with a dream has a fair chance to realize it.

Most of this work will be done by individual Americans acting day by day to increase tolerance and understanding. But the ADA also required Five Federal Agencies to come up implementation regulation or guidelines. These regulations relating to employment, public accommodation, transportation, and communications are key to the full implementation of ADA.

And so I'm proud to announce that most of these Federal regs will be issued today.

All guidelines required of the Department of Justice, the EEOC, the FCC are in final form, and those regarding transportation will be issued soon. I want to thank the people of the Executive Branch who have worked so hard to make the ADA a reality.

And in addition, today I'm issuing a memorandum to Federal Departments and Agencies. And it directs them to recruit people with disabilities as Federal employees and to ensure that Americans with disabilities have access to Federal programs. The Federal Government must serve as a model employer for the rest of the Nation.

And again, thank you all so very much for your work, for your dedication, and for your devotion and your steadfast faith, and to **[Page 965]** many here, for your inspiring

example. And may God bless you all. And thank you very, very much.

APPENDIX D

[*Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong. (1989)]

[Page 808]

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PREPARED STATEMENT OF RICHARD THORNBURGH

Mr. Chairman, distinguished members of the Committee, it is a great pleasure for me to be able to present to you the Administration's views on the proposed Americans With Disabilities Act. Twenty-five years ago to this day, Congress and the President were putting the finishing touches on the Civil Rights Act of 1964, the most important civil rights legislation ever passed. It is exciting for me to be a part of the process which, this year, will pass legislation that will extend the Nation's civil rights guarantees to the disability community. Persons with disabilities have already made enormous contributions to American society, and can and will contribute even more as legislation goes forward in this Congress to improve their even greater entry into the mainstream.

It is estimated that there are over 36 million Americans with disabilities. President Bush has consistently supported efforts to bring these Americans into the 'mainstream' of American society. As Vice President, he stated that we must develop programs and policies that promote independence, freedom of choice, and productive involvement in the social and economic mainstream. This means access to education, jobs, public accommodations, and public transportation — in

other words, full participation in and access to all aspects of society. This year, in his remarks to the Joint Session of Congress, the President reiterated this commitment. We at the Department of Justice wholeheartedly share these goals and commit ourselves, along with the President and the rest of the Administration, to a bipartisan effort to enact comprehensive legislation attacking **[Page 809]** discrimination in employment, public services, transportation, public accommodations, and telecommunications.

Despite the best efforts of all levels of government and the private sector and the tireless efforts of concerned citizens and advocates everywhere, many persons with disabilities in this Nation still lead their lives in an intolerable state of isolation and dependence. Fifteen years have gone by since the Rehabilitation Act was passed. In that time the doors of educational opportunity have been opened to persons with disabilities. Nevertheless, persons with disabilities are still too often shut out of the economic and social mainstream of American life. The unreasonable and, in most cases, unthinking failure to eliminate attitudinal, architectural, and communications barriers in employment, transportation, public accommodations, and telecommunications denies persons with disabilities an equal opportunity to contribute to and benefit from the richness of American society. The continued maintenance of these barriers impose staggering economic and social costs and inhibits our sincere and substantial Federal commitment to the education, rehabilitation, and employment of persons with disabilities. The elimination of these barriers will enable society to benefit from the skills and talents of persons with disabilities and will enable persons with disabilities to lead more productive lives.

Efforts to develop comprehensive legislation to ensure equal opportunity for disabled persons should, of course, also be **[Page 810]** mindful of other principles as well. First, any

new legislation should take into consideration the existing fabric of Federal laws prohibiting discrimination on the basis of handicap. During the past two decades, Congress has enacted a series of statutes focusing on a wide range of problems and providing an intricate web of enforcement procedures. The courts and Federal agencies have also been active in interpreting these laws, defining the meaning of nondiscrimination in the context of disability. Any new legislation should be coordinated with this body of law in order to avoid inadvertent conflicts, confusion, the inefficient use of enforcement resources, and unnecessary litigation.

New legislation prohibiting discrimination on the basis of disability should use as its model the panoply of civil right laws prohibiting discrimination on the basis of race, color, national origin, and sex. We must end the anomaly of widely protecting women and minorities from discrimination while failing to provide parallel protection for people with disabilities.

New legislation should also be designed to keep the development of intrusive Federal regulation to a minimum. It is the Administration's goal to regulate the private sector only in those situations where it is necessary and only to the extent called for by the problem at hand. Concerns for the economic efficiency of America's businesses, especially its small entrepreneurs, and for competitiveness in the world economy must be given due weight. Legislation which unduly burdens American businessmen and women is ultimately in no one's interest. **[Page 811]** Federal action in this area should likewise recognize that States can act (and most have already acted) to protect the rights of persons with disabilities in ways tailored to each State's particular circumstances.

Finally, the issue of costs, both the fiscal cost of lost income tax revenues and increased transfer payments when disabled persons are not accommodated and the cost of accommodating persons with disabilities, must be

considered. Careful consideration must be given to whether the line on costs has been drawn in the proper place, and we will need to work together in the weeks ahead on this.

The cost issue is made more difficult because it is virtually impossible to put a price tag on the accommodations required by any bill in this area. For example, while widening an existing doorway will cost $300 to $600, no one can estimate with any degree of reliability how many doorways will need to be widened. Making accurate cost predictions is also hampered by ambiguity in the standards enunciated in S. 933.

Similarly, we must recognize that passing comprehensive civil rights legislation protecting persons with disabilities will have direct and tangible benefits for our country. As with the area of costs, we have found it difficult to quantify the exact economic benefits of legislation in fiscal terms. Certainly, the elimination of employment discrimination and the mainstreaming of persons with disabilities will result in more persons with disabilities working, in increased earnings, in less **[Page 812]** dependence on the Social Security system for financial support, in increased spending on consumer goods, and increased tax revenues.

With these principles as a guide, I would like to address the "Americans with Disabilities Act of 1989." This Committee is to be commended for its efforts in drafting S. 933. One of its most impressive strengths is its comprehensive character. Over the last 20 years, civil rights laws protecting disabled persons have been enacted in piecemeal fashion. Thus, existing Federal laws are like a patchwork quilt in need of repair. There are holes in the fabric, serious gaps in coverage that leave persons with disabilities without adequate civil rights protections. In some areas, there are overlapping pieces of fabric, duplication that has resulted in confusion and counterproductive enforcement efforts. The Administration supports the legislative effort to

enact a bill that is at one time cohesive, coordinated, and comprehensive.

I am pleased that S. 933 includes provisions pertaining to job discrimination. Perhaps the most glaring omission in the landscape of disability rights laws is that there is nothing in the Federal law that prohibits discrimination in employment in the private sector against those with disabilities. While persons who work for the Federal Government, who work in federally assisted programs, or who work for certain Federal contractors are protected from discrimination on the basis of handicap, most other workers are not. Each year in this country, **[Page 813]** over 150,000 young men and women with disabilities complete their education under the Education of the Handicapped Act, some receiving high school diplomas, some receiving certificates of completion. This education law has been one of our modern success stories in the disability area. But if our investment in the education of these students is to bear fruit, we must ensure that they face an employment arena similarly free of discrimination on the basis of handicap.

President Bush endorses your concept of paralleling in the disability area Title VII of the Civil Rights Act of 1964, the landmark statute that prohibits discrimination on the basis of race, color, national origin, sex and religion. Furthermore, it is the Administration's view that such legislation should use the standard provided by section 504 of the Rehabilitation Act of 1973 — the concept that nondiscrimination includes the requirement that an employer make reasonable accommodation to the known mental or physical impairments of qualified disabled persons as long as making the accommodation would not result in an undue hardship on the operations of the employer.

Such a law would be a major step forward for persons with disabilities. We must be mindful, however, of the cost burdens that this law more than other civil rights laws will place on businesses. It is our goal here to seek a balance: to

bring persons with disabilities into the mainstream of American economic life and reduce the cost to society of exclusion while, at the same time, keeping the American economic system strong and **[Page 814]** viable. We are concerned with the impact of S. 933 on small businesses. Because small businesses have limited financial resources, they do not have the advantage of spreading the costs of accommodations over a large payroll. Further, their small workforce gives them limited flexibility in restructuring jobs, a frequently used method of making reasonable accommodations. For these reasons, the Administration would like to join the dialogue with this Committee on the appropriate extent of coverage for smaller employers.

Of course, any legislation must be consistent with Federal drug-free workplace initiatives. I need not remind this Committee of the scourge of illegal drug use in this country and its frightening impact on daily American life. We believe that this bill should make clear that substance abusers should not be included within the protections of this civil rights statute. The bill should also be fully consistent with this Administration's commitment to the eradication of substance abuse in the workplace and elsewhere.

The inclusion of public accommodations in the "Americans with Disabilities Act" is a Federal recognition of their importance in American life. Just as Title II of the Civil Rights Act of 1964 opened up restaurants and theaters to Black Americans, S. 933 promises to persons with disabilities the ability to enjoy full participation in our American way of life. The Administration endorses the prohibition of discrimination on the basis of disability in public accommodations. Recent studies **[Page 815]** show that persons with disabilities are too often discouraged from attending concerts, going to restaurants, and attending movies. We recognize that requiring public accommodations to make themselves accessible to persons with mobility impairments and to provide auxiliary aide to those with

visual and hearing impairments could result in significant costs. We would like to work with this Committee to develop provisions that will ameliorate the cost burden. Similarly, we need to work together to define the parameters of coverage in this area. We think that modifications to S. 933 should address our concerns regarding the scope of public accommodations.

We also seek a bill in this area that will provide clear guidance so that unnecessary and costly litigation can be avoided. Great care then should be taken in crafting a standard for what constitutes discrimination. It may be preferable to use terms and concepts from section 504, a law that now has a 16-year history, rather than developing new terms and standards. Finally, any new legislative initiative should avoid potential confrontation with the First Amendment to the Constitution that might arise with the coverage of religious institutions.

The provision of accessible transportation for persons with disabilities has been one of the most complex issues faced by Congress and the Executive Branch. Four statutes[1] and a series **[Page 816]** of current DOT regulations present an interrelated, complicated set of obligations. Several Federal circuit courts have interpreted these statutes and rules. The President agrees with this Committee that additional legislation is needed to set the record straight. We must be careful, however, that our efforts clarify the picture, rather than adding to the confusion.

Our goal, and yours, is to ensure that persons with disabilities have access to adequate transportation in this

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[1] Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794; section 16(a) of the Urban Mass Transportation Act of 1964, as amended, 49 U. S. C. § 1612 (a); section 165 (b) of the Federal-Aid Highway Act of 1973, as amended, 23 U.S.C. § 142, note; and section 317(c) of the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 1612(d).

country, and we support legislation that would focus our efforts on publicly funded transportation services. We recommend enactment of a bill that would, for the first time, guarantee that public bus systems in this country be accessible to persons with mobility impairments. Thus, legislation should require that all new public buses be accessible to persons with disabilities. The Secretary of Transportation should have the flexibility to relax this requirement for any municipality where accessible bus service would prove to be impractical. For instance, in localities with extremely inclement climates where wheelchair lifts do not function for much of the year, it may be more practical to provide accessible paratransit service. Because the average life of a bus is 12 years, accessible bus transportation would become a reality in this country in a relatively short period of time, except for the cases where accessible buses are ineffective. As with other sections of S. 933 that involve state **[Page 817]** and local government services, my experience as a Governor teaches me that it will be important to get input from the affected officials and people with disabilities from around the country before finalizing these provisions.

In addition, legislation should also require paratransit services that supplement, rather than duplicate, the fixed-route bus service. Ideally, paratransit service should be aimed at those severely disabled persons who are unable to use mainline accessible transportation.

Again, we should recognize the cost implications of these requirements. In the public transportation area, a considerable percentage of the capital costs of public transit authorities is borne by the Federal Government. It is unlikely, given existing fiscal constraints, that any substantial amount of new monies will be available in the Federal budget for transportation. Thus, these increased costs for accessibility must be carried out with already planned outlays. Given these fiscal constraints, we think some

reasonable limitation on paratransit service costs may be appropriate and we are prepared to discuss with the Committee the level for such a limit.

On another matter, the Administration agrees that a comprehensive bill should address the issue of making our Nation's telecommunications system accessible to deaf persons. The inability to communicate by telephone renders the routine tasks of daily living — such as making a doctor's appointment or inquiring about a job opportunity — difficult or even impossible **[Page 818]** to accomplish. Establishment of a telecommunications relay service is clearly a vital step toward full integration of deaf persons into the mainstream. Legislation addressing this issue, though, should take into account the ongoing Federal Communications Commission inquiry mandated by the Telecommunications Accessibility Enhancement Act,[2] and preserve the maximum degree of freedom for the FCC to use its expertise in determining which specific requirements will result in the most efficient and cost-effective system.

Because S. 933 uses existing civil rights laws for minorities and women as its model, the remedies under this bill should parallel these existing laws. For example, the enforcement procedures and remedies now available under title VII of the Civil Rights Act of 1964 should be used for violations of discrimination based on disability in the employment area; and Title II's enforcement scheme should be available to redress discrimination based on disability in places of public accommodation. This approach is fair and easy to-implement. It would provide persons with disabilities with a full array of remedies, including preventive relief and reimbursement for out-of-pocket expenses, including backpay. In addition, use of enforcement mechanisms already in existence should ease enforcement and eliminate

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2 Pub. L. No. 100-542, 102 Stat. 2721 (1988).

inconsistencies and confusion among those who have to comply with the law.

[Page 819] I have witnessed the many faces of discrimination confronting persons with disabilities. As noted, over 36 million people in this country are disabled by reason of some physical or mental handicapping condition. The mere existence of these handicapping conditions does not for many of these individuals prevent then from interacting freely with others in society, or from performing the tasks that others perform on a daily basis. But persons with disabilities are all too often not allowed to participate because of stereotypical notions held by other in society — notions that have, in large measure, been created by ignorance and maintained by fear.

It is precisely these sorts of antiquated attitudes that have blocked people with disabilities from entering the mainstream of American life. Certainly attitudinal changes cannot be simply commanded or even legislated out of existence. No particular court order or single piece of legislation can alone change longstanding perception or misperceptions; regrettably, attitudes can only be reshaped gradually. One of the keys to this reshaping process is to increase contact between and among people with disabilities and their able-bodied peers. And an essential component of that effort is the development of a comprehensive set of laws supported by a helpful set of regulations that all work together to promote the integration of people with disabilities into our communities, schools, and workplaces.

APPENDIX E

[*Americans with Disabilities Act of 1990: Hearings on H.R. 2273 Before the House Comm. on the Judiciary and the Subcomm. on Civil and Constitutional Rights*, 101st Cong. 198-99, 206-07 (1989)]

[Page 198]

PREPARED STATEMENT OF DICK THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA

Mr. Chairman, distinguished members of the Committee, it is a great pleasure for me to be able to present to you the Administration's views on the proposed Americans with Disabilities Act. It is exciting to be a part of a process which, this year, will see the passage of legislation that will extend the Nation's civil rights guarantees to Americans with disabilities. Persons with disabilities have already made enormous contributions to American society, and can and will contribute even more as legislation goes forward in this Congress to increase their access into the social and economic mainstream of American life. We want America to be an opportunity society for all Americans, and that requires taking actions to make opportunities available to Americans with disabilities.

Despite the best efforts of all levels of government and the private sector and the tireless efforts of concerned citizens and advocates everywhere, many persons with disabilities in this Nation still lead their lives in an intolerable state of isolation and dependence. Over fifteen years have gone by since the Rehabilitation Act of 1973 conferred on Federal and federally assisted programs the responsibility to accommodate Americans with disabilities. In that time, the doors of opportunity have been opened to persons with disabilities. Nevertheless, persons with disabilities are still

too often shut out of the economic and social mainstream of American life. The unreasonable and, in most cases, unthinking failure to eliminate attitudinal, architectural, and communications barriers in employment, transportation, public accommodations, public services, and **[Page 199]** telecommunications denies persons with disabilities an equal opportunity to contribute to and benefit from the richness of American society. The continued maintenance of these barriers imposes staggering economic and social costs and inhibits our sincere and substantial Federal commitment to the education, rehabilitation, and employment of persons with disabilities. The elimination of these barriers will enable society to benefit from the skills and talents of persons with disabilities and will enable persons with disabilities to lead more productive lives.

On June 22, 1989, I testified on the Americans with Disabilities Act before the Senate Committee on Labor and Human Resources. At that time, the Administration endorsed the concept of comprehensive legislation in the disability rights area and viewed S. 933, the Senate analogue to H.R. 2273, as the appropriate vehicle for such landmark legislation. My testimony did, however, raise areas of concern that needed to be addressed before the Administration could specifically endorse the Americans with Disabilities Act. During this past summer, representatives of the Administration engaged in prolonged negotiations with the Senate on this bill. These discussions led to revisions in S. 933 and eventually to the bill that passed the Senate on September 7, 1989, with broad bipartisan support.

I am therefore pleased to reiterate the Administration's support of the Americans with Disabilities Act. This bill is **[Page 200]** fair, balanced legislation. It will ensure that persons with disabilities in this country enjoy access to the mainstream of American life. It builds on an extensive body of statutes, case law, and regulations to avoid unnecessary

confusion; it allows maximum flexibility for compliance; and it does not place undue burdens on Americans who must comply. The Administration asks that you consider the Americans with Disabilities Act expeditiously and the Administration hopes that the bill will be signed into law before the end of this year.

President Bush has consistently supported efforts to bring persons with disabilities into the mainstream of American society. As Vice President, he stated that we must develop programs and policies that promote independence, freedom of choice, and productive involvement in our social and economic mainstream. This means access to education, jobs, public accommodations, public services, and public transportation — in other words, full participation in and access to all aspects of society. This year, in his remarks to the Joint Session of Congress, the President reiterated this commitment.

We believe that S. 933, successfully incorporates the President's goals. It provides an effective means of combating discrimination and yet gives latitude to employers, public accommodations, and other entities covered by the bill to allow **[Page 201]** them the flexibility to achieve compliance without placing an undue burden on their operations.

The comprehensive scope of the Americans with Disabilities Act will fill serious gaps in the patchwork quilt of existing Federal laws protecting disabled persons. Perhaps the most glaring gap in the fabric of existing disability rights laws is that there is little in the Federal law that prohibits discrimination in employment in the private sector against those with disabilities. While persons who work for the Federal Government, who work in federally assisted programs, or who work for certain Federal contractors are protected from discrimination on the basis of handicap, most other workers are not. Each year in this country, over 150,000 young men and women with disabilities complete

their education under the Education of the Handicapped Act, some receiving high school diplomas, some receiving certificates of completion. This education law has been one of our modern success stories in the disability area. But if our investment in the education of these students is to bear fruit, we must ensure that they face a labor market similarly free of discrimination on the basis of handicap.

The Americans with Disabilities Act wisely parallels in the disability area title VII of the Civil Rights Act of 1964, the landmark statute that prohibits discrimination in employment on the basis of race, color, national origin, sex, or religion. The **[Page 202]** Americans with Disabilities Act, as passed by the Senate, appropriately phases in its coverage. When they go into effect two years after enactment, the employment provisions will cover only those employers with 25 or more employees. Two years later, coverage will be extended to include all employers with 15 or more employees. Under this phase-in approach, the more immediate burdens of compliance will fall on those larger businesses most able to bear them. We also believe that the two-year implementation period will ease any initial confusion regarding compliance requirements by giving the Administration adequate time to craft regulations and engage in wide-reaching technical assistance efforts.

Furthermore, the Administration is pleased that the employment provisions of the Americans with Disabilities Act closely follow the standards provided by section 504 of the Rehabilitation Act of 1973 — including the concept that nondiscrimination includes the requirement that an employer make reasonable accommodation to the known mental or physical impairments of qualified disabled persons as long as making the accommodation would not result in an undue hardship on the operations of the employer. The fact that many of the employment provisions of the Americans with Disabilities Act are drawn directly and, in many instances, even taken verbatim from the Federal regulations

implementing section 504 represents a particularly wise choice. The section 504 standards are familiar **[Page 203]** to large segments of the private sector already covered by the Rehabilitation Act. Experience has shown that these standards do not result in undue costs or excessive litigation.

The Administration is satisfied that the Senate-passed Americans with Disabilities Act is consistent with Federal drug-free workplace initiatives. I need not remind this Committee of the scourge of illegal drug use in this country and its frightening impact on daily American life. Under the Senate bill individuals who are illegally using drugs are not included within the protections of the bill and the legality of drug testing is not affected. The bill is fully consistent with this Administration's commitment to the eradication of substance abuse in the workplace and elsewhere.

The inclusion of public accommodations in the "Americans with Disabilities Act" is a Federal recognition that an opportunity society provides access to the mainstream of everyday life. Just as title II of the Civil Rights Act of 1964 opened up hotels, restaurants, and theaters to Black Americans, the Americans with Disabilities Act promises to persons with disabilities the right to enjoy full participation in our American way of life. The Administration endorses the prohibition of discrimination on the basis of disability in public accommodations and its extension to a wide range of entities. Persons with disabilities should not be discouraged **[Page 204]** from attending concerts, going to restaurants, and attending movies. And they should not have to face insurmountable obstacles in accomplishing such vital tasks of daily life as grocery shopping or visiting a pharmacy or doctor's office, or going to the dry cleaners.

We recognize that imposing an unlimited requirement that public accommodations make themselves accessible to persons with mobility impairments and provide auxiliary aids to those with visual and hearing impairments could result in significant costs. However, the ADA, as passed by the

Senate, provides a series of limitations on compliance requirements. For example, physical barriers need only be removed when the removal is "readily achievable" and auxiliary aids must be provided only if they will not result in an undue burden. Under the Americans with Disabilities Act, for example, a restaurant would not be required to provide menus in braille for blind patrons, if the waiters in the restaurant were willing to read the menu. The Act also has minimal requirements for retrofitting existing facilities. In fact, the Act's "readily achievable" standard requires that existing architectural barriers be removed when doing so is easily accomplishable or able to be carried out without much difficulty or expense.

As an essentially forward-looking bill, the legislation reserves the most rigorous accessibility requirements for new **[Page 205]** construction, resulting in an estimated increase of construction costs of no more than one percent. Even this now construction requirement has certain limitations that attempt to mitigate costs. The Americans with Disabilities Act contains an exception for placing elevators in new or altered buildings, perhaps the most costly capital expense for making buildings accessible. Any building that has less than 3,000 square feet per story or that is less than three stories in height need not be constructed with an elevator. The Administration believes a more prudent course would make the requirement apply to new construction of buildings with more than 3 stories. Only multistory shopping malls, professional offices of health care providers, and other categories of buildings designated by the Attorney General would be required to have elevators.

The Administration also supports the Senate bill's exclusion of religious organizations and entities controlled by religious organizations from the reach of the public accommodations provisions. Places of worship and the activities of entities controlled by religious organizations have been prudently excluded from the bill.

The Administration is well aware of the costs that litigation designed to test novel theories can impose an business in this country. In order to avoid unnecessary and costly litigation, the Americans with Disabilities Act, in most cases, **[Page 206]** Congress and the Executive Branch. Four statutes[1] and a series of current Department of Transportation regulations present an interrelated, complicated set of obligations. Several Federal circuit courts have interpreted these statutes and rules. The President agrees that additional legislation is needed to bring certainty to this area and believes that the Americans with Disabilities Act appropriately clarifies transit requirements.

Our goal, and yours, is to ensure that persons with disabilities have access to adequate transportation in this country. The Americans with Disabilities Act would, for the first time, guarantee that public bus systems in this country are accessible to persons with mobility impairments by requiring that all new public buses be accessible to persons with disabilities with the Department of Transportation empowered to grant waivers in the narrow circumstances where such buses are unavailable. No retrofitting of existing buses is required by the bill. Requiring that all new buses be accessible is a major change in Federal transportation policy and a welcome one. The unavailability of accessible public transportation in areas served by public transit continues to be a major barrier to the employment of persons with disabilities and a significant factor **[Page 207]** in continuing their isolation from everyday American life. The Administration views this provision of the Americans with Disabilities Act as a key component of the bill.

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[1] Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794; section 16(a) of the Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. § 1612(a), section 165(b) of the Federal-Aid Highway Act of 1973, as amended, 23 U.S.C. § 142 note; and section 317(c) of the Surface Transportation Assistance Act of 1982, 49 U.S.C.§ 1612(d).

Approximately 35% of the buses used in urban mass transit in this country are already accessible. Because the average life of a bus is 12 years, accessible bus transportation would become a reality in this country in a relatively short period of time.

In addition, the Administration is pleased that the Americans with Disabilities Act requires the provision of supplementary paratransit services. Approximately 75% of all transit agencies already provide paratransit services. The Americans with Disabilities Act would permit paratransit services that supplement, rather than duplicate, the fixed route bus service. Further, under the Americans with Disabilities Act, paratransit services need only be provided to those disabled persons who are unable to use mainline accessible transportation. Thus, those persons whose physical or mental disability is so severe that they are unable to use the accessible mainline bus system will be eligible to gain access to their community through paratransit services.

Again, the Americans with Disabilities Act wisely recognizes the cost implications of paratransit service. If providing paratransit services at a level that is comparable to the **[Page 208]** accessible fixed route system is so costly that it results in undue financial burden on the local transit authority, the local government can provide a reduced level of services. The Secretary of Transportation will issue regulations on what constitutes an undue financial burden and, in doing so, can use a "flexible numerical formula" that incorporates appropriate local characteristics. In this era of fiscal constraints, the paratransit provisions of the Americans with Disabilities Act strike a responsible balance between providing accessible transportation and protecting the economic viability of local transit providers.

During negotiations between the Senate and the Administration, the exact nature of the accessibility requirements for intercity bus services by private entities proved to be a thorny issue. The Administration believes that

the in depth three year study to be done by the Office of Technology Assessment will provide valuable information on cost effective ways to provide accessible intercity bus transportation and can provide a basis for further legislation in this difficult area. Because there is substantial evidence of the financial fragility of private intercity bus operators, the Administration expects that the study will provide detailed analyses and recommendations on a wide range of accessibility strategies and their relationship to the provision of bus service, particularly in rural areas. We think that delaying the implementation of the **[Page 209]** rather than attempting to develop new terms and standards, incorporates terms and concepts from section 504, a law that now has a 16-year history.

We are pleased that the Americans with Disabilities Act, as passed by the Senate, does not create additional monetary incentives for private litigation. Earlier versions of the bill would have unduly encouraged private suits by offering the prospect of jury trials, large monetary awards, and punitive damages. Under the Senate bill, the remedies available in suits by private litigants against public accommodations are limited to injunctive relief, attorneys fees, and court costs. Authority to seek monetary damages and civil penalties is given only to the Attorney General and, even then, only in pattern or practice cases or suits of general public importance. The Department of Justice intends to limit its requests for monetary damages to compensation for out-of-pocket losses and would not include speculative damages or damages for pain and suffering. In fact, it is only in the employment area that any monetary relief is available to private litigants, and that particular relief, in the form of back pay, has boon available under other civil rights employment statutes for the last 25 years.

The provision of accessible transportation for persons with disabilities has been one of the most complex issues faced by **[Page 210]** Americans with Disabilities Act's

requirement that new intercity buses be accessible until 7 years from the date of enactment for small providers (6 years for other bus service providers) is necessary. The three-year period between the completion of the OTA study and the effective date of the Americans with Disabilities Act's requirements will give more than ample time for the Department of Transportation and the Congress to make appropriate regulatory and statutory changes based on the study. Maintaining the Act's accessible bus requirement during this interim period will act as a spur to the development of technological advances in this area.

On another matter, the Administration strongly supports the Americans with Disabilities Act requirements mandating that our Nation's telecommunications system be made accessible to deaf persons. The inability to communicate by telephone renders the routine tasks of daily living — such as making a doctor's appointment or inquiring about a job opportunity — difficult or even impossible to accomplish. Establishment of a telecommunications relay service is clearly a vital stop toward full integration of deaf persons into the mainstream.

The Administration particularly endorses the technical assistance provisions in the Americans with Disabilities Act that were added to the bill in an amendment sponsored by Senator Dole. It is our belief that the entities covered by this landmark bill **[Page 211]** — employers, public and private transit agencies, State and local governments, telephone companies, and public accommodations — will comply with the law voluntarily. We therefore expect that Federal efforts to provide information on the law's requirements and on how to comply in a cost-effective manner will be well-received and reduce the total cost to society of complying.

We at the Department of Justice wholeheartedly share the goals of the Americans with Disabilities Act and commit ourselves to an effective program of enforcement of the Act's provisions. We have begun the process of analyzing the

Department's specific responsibilities under the bill and pledge that our enforcement effort will be fair and vigorous and that our technical assistance program will be thorough, creative and cost-effective. In addition, the Department of Justice is currently reviewing the impact of the Americans with Disabilities Act on its resources and organizational structure.

As a parent, as a former Governor, and as Attorney General, I have witnessed the many faces of discrimination confronting persons with disabilities. About 40 million people in this country are disabled by reason of some physical or mental handicapping condition. The mere existence of these handicapping conditions does not, for many of these individuals, prevent them from interacting freely with others in society, or from **[Page 212]** performing the same tasks that others perform on a daily basis. But persons with disabilities are all too often not allowed to participate because of stereotypical notions held by others in society — notions that have, in large measure, been created by ignorance and maintained by fear.

It is precisely these sorts of antiquated attitudes that have blocked people with disabilities from entering the mainstream of American life. Certainly attitudinal changes cannot be simply commanded or even legislated out of existence. No particular court order or single piece of legislation can alone change longstanding perception or misperceptions; regrettably, attitudes can only be reshaped gradually. One of the keys to this reshaping process, however, is to increase contact between and among people with disabilities and their more able-bodied peers. And an essential component of that effort is the enactment of a comprehensive law that promotes the integration of people with disabilities into our communities, schools, and work places.

Mr. Chairman, the "Americans with Disabilities Act" can be the vehicle that brings persons with disabilities into

the mainstream of American life. We have an historic opportunity to move legislation through the Congress given the broad support for its purpose. On behalf of the Administration, I pledge to this Committee and to the Congress our support to produce a bill that can be signed this year.

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Supreme Court of the United States

THE UNIVERSITY OF ALABAMA AT BIRMINGHAM, BOARD OF TRUSTEES, and THE ALABAMA DEPARTMENT OF YOUTH SERVICES,

Petitioners,

v.

PATRICIA GARRETT and MILTON ASH,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION (NELA), NATIONAL FEDERATION OF THE BLIND (NFB), *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

This brief is submitted by the National Employment Lawyers Association (NELA), the National Federation of the Blind (NFB), the American Diabetes Association and the American Association of University Professors (AAUP).

NELA, a voluntary membership organization exceeding 3,000 attorneys, is the country's only professional membership organization of lawyers who regularly represent employees in labor, employment and civil rights disputes. NELA regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA has filed numerous *amicus curiae* briefs before this Court regarding the proper interpretation and application of employment discrimination laws to insure that these laws are fully enforced and that the rights of workers are fully protected. NELA participated as amicus curiae in the lower court's decision, *Garrett v. University of Alabama Bd. of Trs.*, 193 F.3d 1214 (11th Cir. 1999). Given NELA's extensive *amicus* participation in some of the most important decisions concerning Eleventh Amendment immunity and employee rights, NELA desires to offer its input on this very important issue.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no person or entity other than the *amici curiae*, their members, and their undersigned counsel made a monetary contribution to the preparation or submission of this brief. No attorney for any party authored this brief in whole or in part. Written consent to the filing of this brief has been obtained from the parties in accordance with Supreme Court Rule 37.3(a). Copies of the consent letters have been filed with the Clerk.

NFB, the leading national organization of blind persons, has affiliates in all 50 states, the District of Columbia and Puerto Rico. The vast majority of the Federation's approximately 50,000 members are blind. The NFB is widely recognized by the public, Congress, executive agencies of government, and the courts as a collective and representative voice of blind Americans and their families. The NFB seeks to promote the general welfare of the blind by (1) assisting the blind in their efforts to integrate themselves into society on terms of equality and (2) removing barriers and changing social attitudes, stereotypes and mistaken beliefs concerning blindness that are held by sighted and blind persons and that result in the denial of opportunity to blind persons in virtually every sphere of life, including employment, education, family and community life, transportation and recreation. The NFB has long been actively involved in promoting equality of opportunity in employment through training, litigation and advocacy.

The American Diabetes Association is the leading advocacy group for advancing the employment rights of persons with diabetes. The Association was one of the leading organizations lobbying for passage of the Americans with Disabilities Act (ADA) and has provided technical support to the Equal Employment Opportunity Commission in promulgating regulations and guidelines to apply the Act to employment situations. The Association has been an active advocate in persuading government agencies to revise employment regulations that undercut the employment rights and remedies of people with diabetes. The Association has played a variety of roles in cases throughout the country, including filing *amicus curiae* briefs before this Court, and serving as a party-plaintiff when the civil rights of persons with diabetes have been violated.

AAUP is an organization of approximately 44,000 faculty members and research scholars in all academic disciplines. Founded in 1915, the Association is committed to the defense of academic freedom and the free exchange of ideas in scholarly and creative work. Among the organization's central functions is the development of policy standards for the protection of academic freedom, tenure, and other elements of higher education, including the ability of professors who work for state universities to seek judicial redress for civil rights violations, such as disability discrimination. *See, e.g., On Discrimination,* AAUP Policy Documents & Reports (1995 ed.). AAUP's policies are widely respected and followed as models in American colleges and universities. *See, e.g., Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 579 n. 17 (1972). AAUP has participated as *amicus* in other sovereign immunity cases threatening the civil rights of professors who teach at public institutions. AAUP is concerned that holding public entities, such as state universities, immune from the ADA will impair the ability of professors and academic professionals to protect themselves from disability discrimination in the workplace.

SUMMARY OF ARGUMENT

Section 5 of the Fourteenth Amendment empowers Congress "to enforce, by appropriate legislation" the mandates of its first section, which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This grant permits Congress to "remedy and deter" unconstitutional acts that violate Section 1, as well as "prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel v. Florida Bd. of Regents*, 120 S.Ct. 631, 644 (2000). While Congress has "wide latitude" in defining the bounds of the latter through prophylactic legislation, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

Thus, relevant to determining whether Congress has acted within the bounds of Section 5 is an understanding of the extent and nature of the "injury to be prevented" by the ADA. This brief demonstrates that before and after the ADA's enactment, there has existed a widespread pattern of unconstitutional discrimination in the employment arena by governmental agencies against disabled persons. Because Congress was confronted with a "widespread and persisting deprivation of constitutional rights," *id.* at 526, it properly enacted Section 5 legislation—the Americans with Disabilities Act—to remedy this evil.

Section I, *infra*, first establishes that stigma and stereotype are the unconstitutional sources of discrimination by public employers against disabled persons and then demonstrates how arbitrary and irrational state conduct has affected all disabled persons. Section II, *infra*, delineates instances of unconstitutional governmental actions that have affected the employment of persons with particular disabilities.

ARGUMENT

I. Stereotypes and Stigmatization—Barriers to Employment of the Disabled—Exist in the Public Sector and Violate the Equal Protection Clause.

The principal barriers to employment for persons with disabilities arise not from the nature of their disabilities, but from (1) stereotypes that equate disability with incapacity and that are grounded in unfounded assumptions and (2) baseless fears or repulsion, that is, stigmatization. States and other public employers have acted on the prejudices endemic in society at large.[2] As this Court noted in the context of Section 504 of the Rehabilitation Act, applicable to certain public sector employment, "Congress [there] acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 284 (1987). Governmental decisions about persons with disabilities based on myths or unfounded fears violate the Equal Protection Clause. *City of Cleburne v. Cleburne Living Ctr*, 473 U.S. 432, 450 (1985).

Discrimination based on stigma arises particularly for persons with diseases or with visible disabilities. For example, in a survey cited in a congressionally auth-

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[2] Many instances of discrimination by municipalities and counties flow from their application of state laws or regulations. Moreover, because there is no basis to suppose that states will operate differently in this regard from subordinate governmental entities and because a state job in one jurisdiction may be a county or local one in another, this brief describes instances of unconstitutional discrimination in the public sector at all levels.

orized study, employers reported that paraplegics were best suited for jobs with a minimum of public contact because of the public's reaction to the disability. Felton & Litman, *Study of Employment of 222 Men with Spinal Cord Injury*, 46 Archives of Physical Med. & Rehab. 809 (1965).[3] As early as 1943, members of Congress took note of the problem of stigmatization, recognizing that the visibility of a disability, rather than its impact on job performance, is often a barrier to employment.[4]

Congress also recognized that stereotyping can bar disabled persons from work that they are competent to perform.[5] As Congress heard again in 1973, "[t]oo

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[3] Cited in Urban Institute, *Report of the Comprehensive Service Needs Study* at 321 n.32 (1975). Congress had authorized the study as part of the Rehabilitation Act of 1973 and heard its results in 1976. *See Rehabilitation of the Handicapped Programs 1976: Hearings before the Subcomm. on the Handicapped of S. Comm. on Labor and Public Welfare*, 94th Cong. 629-62 (1976) (testimony of Jerry Turem, chief author of the *Needs Study*).

[4] "There are individuals who have facial or other disfigurements that are a little repulsive to the public. They cannot get or hold a job unless they are given plastic operations or prosthetic devices which can correct most of the disfigurement. Often that alone enables them to resume their former occupations." Rep. Walter Judd, regarding the Barden-LaFollete Amendments to Rehabilitation Act, 89 Cong. Rec. 5660 (1943) [hereinafter *Barden-LaFollette*].

[5] "When we speak of the blind, we immediately picture a figure in dark glasses standing at a street corner with a tin cup. In the face of the present shortage of manpower for essential war industries, we are just beginning to become aware of a reservoir of competent, dependable labor that has

(continued...)

frequently, public attitudes and popular misconceptions about the 'helplessness' of the handicapped present individuals with far more formidable vocational obstacles than do the physical disabilities such individuals might actually have sustained."[6]

Statistics demonstrate the nature and sweeping effect of employment discrimination by the states. In April 1989, the Advisory Commission on Intergovernmental Relations (ACIR) reported that "[n]ot working is perhaps the truest definition of what it means to be disabled." *Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal* 18 (April 1989). Over four-fifths of the state government representatives surveyed believed that negative attitudes and misconceptions had a moderate to strong impact on the ability of disabled persons to secure state employment. *Id.* at 72. At the root of these attitudes, state employers reported, were "feelings of discomfort in associating with disabled individuals" and "inaccurate assessments of their productivity." They acknowledged that "negative attitudes persist, despite evidence that handicapped workers are productive." *Id.* at 73.

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[5] (...continued)
been waiting for an opportunity to become useful—the blind workers of this country. . . . The real man is often masked behind his physical handicap. . . ." *Barden-LaFollette, supra* note 4, at 5664 (statement of Rep. William Troutman).

[6] *Randolph-Sheppard Act for the Blind Amend. of 1973 Hearings on S. 2581 before the Subcomm. on the Handicapped Labor & Public Welfare Comm.* 93d Cong. 66 (1973) [hereinafter *Randolph-Sheppard Hearings*] (testimony of Charles W. Hoehne).

A study issued shortly after the passage of the ADA reported that New York state employees "confront disabilities with stereotypes, ignorance, misinformation, fear, and pity that impede progress toward equal opportunity," and concluded that "cultural attitudes toward disability are the most enduring barriers to the full participation of people with disabilities in society."[7]

In the face of such widespread discrimination, complaints against public sector employers have been overwhelming. In September 1977, the Director of the Justice Department's Office for Civil Rights explained to a House Subcommittee that disability discrimination complaints filed under Section 504 of the Rehabilitation Act of 1973 were increasing sharply. The majority of these complaints concerned employment discrimination by governmental entities, including school districts, colleges and universities, health facilities and social service agencies, and involved failures to hire or rehire, dismissals, suspensions, and failures to promote. These complaints were so numerous that they were beyond the ability of the Justice Department to handle.[8]

The states have also discriminated against persons with disabilities in training for employment. For example, the Comprehensive Employment and Training Act (CETA) was enacted to provide programs to train the

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[7] Sharon L. Harlan & Pamela M. Robert, *Disability in Work Organizations: Barriers to Employment Opportunity*, Final Report at xiii, State Univ. of New York, Albany (1995).

[8] *Implementation of Section 504, Rehabilitation Act of 1973: Hearings before the House Subcomm. on Select Educ. of the Comm. on Educ. and Labor*, 95th Cong. 302-303 & 317 (1977) [hereinafter *Section 504 Hearings*] (statement of David Tatel).

unemployed. But as Congress was advised, the programs run by governmental entities shunned the disabled.[9] On a nationwide basis "handicapped men and women made up . . . less than 3% of those [enrolled] in public service jobs under titles II and VI" of CETA.[10] Program operators, Congress was told, were "reluctant to deal with handicapped persons because they feel uncomfortable or don't know how to respond. They may have unpleasant feelings of pity, helplessness, fear, or revulsion."[11]

The CETA experience is in no way a localized problem. Negative stereotypes of the disabled as incapable infect the very state rehabilitation agencies charged with assisting the disabled with employment. One witness before Congress described the mindset so often typified by state rehabilitation agencies:

> Disability has all too often been equated with lack of ability. Untested assumptions are evident, and stereotyping has hidden the characteristics and abilities of persons with disabilities under the blanket of these assumptions. As a result, low

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[9] *Oversight Hearings on the Rehabilitation Act of 1973: Hearings before the House Subcomm. on Select Educ. of the Comm. on Educ. and Labor*, 95th Cong. 368 (1978) [hereinafter *Oversight Hearings*] (statement of T.P. Hipkins).

[10] *Id.*

[11] *Id.* at 369. Over twenty years later, the Mendicino County Department of Social Services routinely diverted disabled applicants from the County work program and directed them to apply for SSI benefits. *OCR Significant Cases, Americans with Disabilities Act: TANF, U.S. Dept. of Health and Human Services*, Office of Civil Rights, (March 2000) *Available at* http://www.hhs.gov/progorg/ocr/casesum.html.

> expectancy is perhaps the single most critical deterrent to success for persons with disabilities. An expectancy cycle has been established that perpetuates low levels of success and low functional employment capabilities.[12]

Thus, one state vocational rehabilitation agency refused to provide education and training to an individual paralyzed from the neck down, because "they did not see any reason" to get him off the SSI benefit rolls.[13] A spokesperson for the deaf explained

> that to be served by [state] rehabilitation agencies for some disability groups, the client must himself adopt the behavior and characteristics traditional to the handicap . . . . It is this insidious perpetuation of situations that in themselves are handicapping that we seek to abolish.[14]

Congress learned in 1985 of employees at the Mississippi Industries for the Blind who had been denied promotions based on their blindness.[15] A head-injured

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[12] *Oversight Hearings, supra* note 9, at 308 (statement of Ronald Torner for United Cerebral Palsy Assoc., Inc.).

[13] *Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988: Hearing before the Subcomm. on Select Educ. of the Comm. on Educ. and Labor*, 100th Cong. 41 (1988) [hereinafter *ADA Oversight Hearing*] (statement of Donald Levine).

[14] *Oversight Hearings, supra* note 9, at 561-62 (testimony of George W. Fellendorf).

[15] *Civil Rights Restoration Act of 1985: J. Hearings on H.R. 700 Before the H. Comm. on Educ. and Labor and the Subcomm. on Civil and Constitutional Rights of the Comm. on the*

(continued...)

survivor testified that after he applied to work with newly head injured-persons, the State of Virginia withdrew the job announcement.[16] Tellingly, Congress heard from a blind woman that the New York State Commission for the Blind would not sponsor her for a masters degree in rehabilitation counseling because "the State would not hire blind rehabilitation counselors."[17]

Quoting a rehabilitation agency psychiatrist that "all blind persons follow a pattern of dependency," Congressman Baring remarked with respect to state rehabilitation agencies:

> Naturally it follows, for those who accept this line of reasoning, that blind people must be closely supervised and protected, not only in the specific area of need in which they may seek aid but in most aspects of their lives, and not merely for a limited period of training and assistance and virtually from cradle to grave.

105 Cong. Rec. A1006-07 (1959) (Hon. Walter S. Baring).

The following section provides a sampler of unconstitutional discrimination against persons with disabilities that arise directly from these misconceptions.

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[15] (...continued)
Judiciary, 99th Cong. 155 (1985) [hereinafter *1985 Civil Rights Hearings*] (statement of Ilene Shane).

[16] *Americans With Disabilities Act of 1989: Hearings on H.R. 2273 before the H. Comm. on the Judiciary*, 101st Cong. 218 (1989) (statement of Geoffrey M. Baynard).

[17] *ADA Oversight Hearing*, *supra* note 13, at 195 (statement of Denise Karuth, Chair, Mass. Coalition of Citizens With Disabilities).

II. An Extensive Record Demonstrates Public Sector Employment Discrimination Against the Disabled Based on Fear, Stigma and Stereotype.

A. *Persons with Cancer Histories*

This Court has noted the irrational discrimination committed by public sector employers against persons with cancer histories: "Even those who suffer or have recovered from such noninfectious diseases as epilepsy or cancer have faced discrimination based on the irrational fear that they might be contagious." *Arline*, 480 U.S. at 284 (citing at n. 13, *inter alia*, Senator Humphrey's remarks, 123 Cong. Rec. 13515 (1977)).

Another court has noted that there is "little question that cancer history raises barriers to employment opportunities . . . unrelated to a person's qualifications." *See, e.g., Burris v. City of Phoenix*, 875 P.2d 1340, 1344-45 (Ariz. Ct. App. 1993) (applicant for a firefighter position who had recovered from testicular cancer was arbitrarily refused employment).

In 1985 and 1987, a Congressional committee focused on employment discrimination against persons with a history of cancer. Each hearing saw dramatic statistics of employment discrimination against cancer survivors. At the first hearing, one Congressman cited a study showing that more than half of cancer patients in white collar jobs and 84% of those in blue collar occupations suffered some kind of discrimination when they returned to work, if they had work to which to return.[18] At the second, there

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[18] *Employment Discrimination Against Cancer Victims and the Handicapped: Hearing before the House Subcomm. on Employment Opportunities of the Comm. on Educ. and Labor* (continued...)

was testimony that close to one million Americans encounter workplace discrimination after being cured.[19]

Numerous instances of irrational discrimination in the public sector against recovered cancer patients were cited at both hearings.[20] One witness, an oncologist, testified

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[18] (...continued)
on H.R. 370 and H.R. 1294, 99th Cong. 5 (1985) [hereinafter *Employ. Hearing of 99th Cong.*] (statement of Rep. Mario Biaggi).

[19] *Hearing on Discrimination Against Cancer Victims and the Handicapped: Hearing before the House Subcomm. on Employment Opportunities of the Committee on Educ. and Labor*, 100th Cong. 28 (1987) [hereinafter *Employ. Hearing of 100th Cong.*] (statement of Rep. Mario Biaggi).

[20] The examples included a 24 year-old who had been free of Hodgkin's disease and its treatment for six years, but who was denied employment as a New York City police officer because of that history; a man who was denied entry into the United States Coast Guard Reserves because of "history of cancerous tumor;" a man who was fired from his position as heavy equipment operator for the city of DeWitt, New York, even though he had recovered from leukemia and had been pronounced fully fit to work by his doctor; a recovered Hodgkin's Disease patient who was "medically disqualified" for Peace Corps Service because of his medical history; a New York City Transit Authority policeman who was denied employment with the New York City Police Department who had recovered from Hodgkin's disease, but who was rejected based on a requirement that applicants have no history of malignant tumors. *Employ. Hearing of the 99th Cong.*, *supra* note 18, at 5-9 (statement of Rep. Mario Biaggi), and at 42-44 (statement of Anthony Igneri). Additionally, a man who had recovered from Hodgkin's disease was disqualified by the New York State (continued...)

that discrimination against recovered cancer patients was "more prevalent in the public sector" than in the private: "I found more cases [of discrimination by] boards of education, . . . the military, [and] government agencies, than maybe people realize."[21]

B. *Persons with HIV*

Because human immunodeficiency virus (HIV) is transmitted only through sexual contact, invasive exposure to blood or certain other bodily fluids, or by perinatal exposure,[22] there are very few jobs in which a person with HIV risks infecting coworkers or customers.[23] Nonetheless, irrational fears among employers abound. In a recent survey funded by the National Institute of Mental Health, approximately half of the respondents believed that AIDS might be transmitted through sharing a drink-

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[20] (...continued)
Civil Service Commission from employment as a police officer based on his history of cancer, even though Sloan Kettering Memorial Hospital attested that he was in perfect health. *Employ. Hearing of 100th Cong., supra* note 19, at 61-79 (statement of Timothy Calonita).

[21] *Employ. Hearing of 99th Cong., supra* note 18, at 57 (statement of Dr. Ivan Barofsky).

[22] Centers for Disease Control and Prevention, *HIV and Its Transmission* (July 1999).

[23] HIV positive individuals can safely work in most jobs without threat of transmission. *See* Centers for Disease Control and Prevention, U.S. Dep't of Health & Human Servs., *Recommendations for Prevention of HIV Transmission in Healthcare Settings, 36* Morbidity & Mortality Weekly Rep. 2S, 3-4 (August 21, 1987).

ing glass, being coughed or sneezed on, or using a public toilet.[24] As a result, "[t]he public is more likely to stigmatize persons with AIDS to the extent that they believe that the virus is easily spread and that people with AIDS should be blamed for their illness."[25]

Unfortunately, public sector employers share these false perceptions. For example, in *Chalk v. United States District Court*, 840 F.2d 701, 707 (9th Cir. 1988), a teacher with AIDS was barred from his classroom due to an unfounded fear that he might transmit AIDS to his students by some heretofore unknown method of contagion, even though the employer's expert acknowledged that there was no scientific evidence of possible alternative routes for infection.[26] Congress was told of a professor of veterinary medicine at a state university who was fired because he had AIDS.[27] At least eleven states by statute deny licenses to practice various professions to persons with contagious diseases without regard to

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[24] *Nationwide Survey Finds Continuing Stigma and Misinformation About Aids*, National Institute of Mental Health (July 1, 1998).

[25] *Id.*

[26] In considering whether to enact the ADA, Congress was told of the discrimination suffered by Mr. Chalk. *Hearing on H.R. 2273, The Americans with Disabilities Act of 1989: J. Hearing before the H. Subcomm. on Employment Opportunities and Select Educ. of the Comm. on Educ. and Labor*, 101st Cong. 105 (1989) [hereinafter *1989 ADA Hearing*] (statement of Arlene Mayerson).

[27] *Americans with Disabilities Act of 1989: Hearing on S. 933 before the S. Comm. on Labor and Human Resources and on the Handicapped*, 101st Cong. 404 (1989) (statement of Nat'l Orgs. Responding to AIDS Coalition).

whether the disease is transmissible in the practice of that profession. For example, someone with HIV cannot be a hearing aid dealer in Alabama, Delaware, Kentucky, North Carolina or North Dakota,[28] or a barber in Mississippi, North Dakota, Oregon, South Carolina, Tennessee, Wisconsin or Wyoming.[29] No rational connection can be drawn between the purpose of protecting the public in the sale of hearing aids and barring persons with HIV from selling hearing aids.

C. *Persons with Epilepsy*

For at least twenty years, it has been true that 80% of epileptics have their seizures controlled by medication. Kettle & Massie, *Need a Disability Be A Handicap?* 13:2 Personnel Mgmt 32 (1981). Yet three years before the enactment of the ADA, Congress learned that 85% of people with epilepsy were unemployed.[30] Clearly, such disparate numbers reflect irrational fear is at work, even the fear that epilepsy is contagious. *See Arline*, 480 U.S. at 284.

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[28] Ala. Code. 34-14-4 (1997); Del. Code Ann. tit. 24, § 3715 (1997); 201 Ky. Admin. Reg. 7:02 (1994); N.C. Gen. Stat. § 93-D5 (1991); N.D. Cent. Code § 43-33-07(d) (1993).

[29] Miss. Code Ann. § 73-5-25(c)(1972); N.D. Cent. Code § 43-04-40 (1993); Or. Rev. Stat. § 690.075 (1989), *amended by* 1999 Or. ALS 425, 1999 Or. SB 290; S.C. Code Ann. § 40-7-240(3) (1986); Tenn. Code Ann. § 62-3-121(3) (1997); Wis. Stat. § 454.15(2)(e)(1998); Wyo. Stat. Ann. § 33-7-207 (Michie 1999).

[30] *Employ. Hearing of 100th Cong., supra* note 19, at 2 (statement of Subcomm. Chairman Matthew G. Martinez).

In *Duran v. City of Tampa*, 430 F. Supp. 75, 76 (M.D. Fla. 1977), the plaintiff sought employment as a police officer, but episodes of childhood epilepsy automatically barred him from consideration, even though he had been seizure-free for sixteen years and had not taken medication for nine. Unrebutted medical testimony established that because Mr. Duran had outgrown his childhood epilepsy, his likelihood of having future seizures was that of the general population. The court, holding that the plaintiff was likely to prevail on the merits, noted that the "public interest demands that all individuals capable of performing a particular task be placed on an equal footing." *Id.* at 78-79.[31]

Similarly, Congress heard from a woman with a Master's degree in social work whose job offer as a children's service worker for the Los Angeles Department of Social Services was withdrawn after the agency learned of her history of epilepsy, even though she had been seizure-free for eleven years.[32] Congress also heard from a volunteer juvenile group counselor with controlled epilepsy whose application for that same position as an employee was denied because of his epilepsy.[33]

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[31] Mr. Duran would fare no better today in Idaho, which requires a police officer to be free of any physical defects and chronic or organic diseases or conditions. Idaho Admin. Code 11.11.01 (2000).

[32] *1985 Civil Rights Hearings*, *supra* note 15, at 673 (statement of Julie Ann Hiller).

[33] *Civil Rights Act of 1984: J. Hearing on S. 2568 before the S. Subcomm. on Educ., Arts and Humanities and the Subcomm. on the Handicapped of the Comm. on Labor and Human Re-*

(continued...)

Even today, Massachusetts specifically bars all persons with epilepsy from being licensed as a barber, without regard to whether medication controls their seizures. Mass. Ann. Laws ch. 112, §87L (2000).

D. *Persons with Mobility Impairments*

Approximately 7.4 million Americans with mobility impairments use Assistive Technology Devices (ATDs).[34] Persons with mobility impairments are able to perform the overwhelming majority of jobs by using wheelchairs, motorized scooters, canes, braces and walkers. Nonetheless, only 22% of working-age wheelchair users and 27% of cane, crutch or walker users are employed.[35] Much of this unemployment is the product of stigma and stereotype.

In one dramatic example of stigmatization in the public sector, a physician with multiple sclerosis was denied a residency in psychiatry, because "the devastation, guilt, pity and rage that can be stirred up in his patients by his physical condition appears to be too much to ask of his patients or of him." *Pushkin v. Regents of the Univ. of*

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[33] (...continued)
sources, 98th Cong. 32 (1984) [hereinafter *1984 Civil Rights Hearing*] (statement of Clarence Hart).

[34] J. Neil Russell et al., *Trends and Differential Use of Assistive Technology Devices: United States, 1994*, Advance Data No. 292 (Nat'l Ctr. for Health Statistics 1997).

[35] U.S. Census Bureau, *Survey of Income and Program Participation (SIPP)*, 1994-1995.

Colo., 658 F.2d 1372, 1387 (10th Cir. 1981).[36]

Two examples demonstrate that even those who succeed in securing public employment are often hindered by employers' irrationality.[37] A quadriplegic psychiatrist applying for a position at a Veterans Administration Hospital in Tampa was asked, bizarrely, if he could read, write and handle a medical chart. Although he was ultimately hired, when he applied unsuccessfully some years later for a position at another VA hospital, he was told by the Chief of Psychiatry at this second institution that he had not been hired because of his wheelchair.[38] A psychologist with cerebral palsy was not invited to sit on a professional panel on the assumption that her speech would be difficult to understand—even though her speech was unimpaired. As she explained to Congress, "Early experience with agencies and institutions revealed inbred prejudices against the physically 'different' person which existed at administrative levels throughout our nation and closed doors to job opportunities to those who have

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[36] Testimony concerning this case was presented to Congress. See *1984 Civil Rights Hearing*, *supra* note 33, at 28 (statement of Arlene Mayerson).

[37] *See also Smith v. Fletcher*, 393 F. Supp. 1366, 1368 (S.D. Tex. 1975), *modified*, 559 F. 2d 1014 (5th Cir. 1977) (Plaintiff with a Master's degree in physiology who was a paraplegic denied promotions by NASA and assigned menial clerical tasks because of "an arbitrary and unfounded decision as to her physical capabilities.").

[38] *Section 504 Hearing*, *supra* note 8, at 460-62 (letter from Steve Halpert, M.D.).

handicaps which are visible."[39]

Stereotypes that ascribe false significance to impairment regularly produce irrational public employer hiring decisions. For example, a teacher was denied a license because, being confined to a wheelchair as a result of poliomyelitis, she was deemed "physically and medically unsuited for teaching." *Heumann v. Board of Educ.*, 320 F. Supp. 623 (S.D.N.Y. 1970).[40] More recently, in Colorado, a teacher with muscular dystrophy who was refused a job interview at a local high school simply because he used a wheelchair, subsequently secured an injunction requiring the school district to employ him.[41] A full professor who became mobility impaired found his grants with the National Science Foundation given to others.[42]

Melvin v. City of W. Frankfort, 417 N.E. 2d 260 (App. Ct., 5th Dist. 1981) powerfully illustrates why myths persist—they seem so true to those who fail to obtain the facts about a particular disability. *Melvin* involved the

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[39] *Section 504 Hearing, supra* note 8, at 459 (letter from Barbara Hoffman, Ph.D.).

[40] The case was ultimately dismissed as moot after the defendant reversed itself, granted plaintiff a license and a position. The Senate Report on the ADA noted Ms. Heumann's experience. S. Rep. No. 116, 101st Cong. 7 (1989).

[41] *Carr v. Fort Morgan Sch. Dist.*, 4 F. Supp.2d 989 (D. Colo. 1998); *see* Jim Kirksey, *Disabled Man to Realize Dream – to Teach*, Denver Post, Aug. 26, 1998 at B-9 (identifying the nature of the disability which was unmentioned in the opinion).

[42] *Section 504 Hearings, supra* note 8, at 471 (letter from George G. Gyrisco).

unfounded assumption that a firefighter with a prosthesis below the knee would be more limited than persons without an amputation. In fact, the Fire Chief of West Frankfort attested that Mr. Melvin's performance as a volunteer fireman had been without limitation and he passed all physical requirements for employment as a firefighter. *Id.* at 261-62. Because state law barred all amputees from being employed as firefighters, the Chief could not hire him. *Id.* The court struck down the statute because it created a distinction not "based upon particularized performance related incapacities." *Id.* at 263. Similarly, a sheet metal worker who, after his amputation had plied his trade for eighteen years, was rejected for the same work by a state university, on the assumption that he could not climb scaffolding. In the face of testimony that he routinely climbed ladders and worked on scaffolds and roofs, the court concluded that the university had erred by assuming that amputees as a group were incapable of performing the work. *Board of Trs. v. Human Rights Comm'n,* 485 N.E.2d 33, 36 (Ill. App. 4th 1985).

In Kentucky, a state regulation precluded anyone "who does not possess both of his natural legs" from driving a school bus. 702 Ky. Admin. Reg. 5:080(1) (1999). Again, an unfounded assumption was in play when a local school district refused to hire the plaintiff, whose leg had been amputated. However, when capacity became an issue of fact, the court struck down the statute, because the evidence was undisputed that he was "a highly competent bus driver who is not hindered at all by his prosthesis . . . and is well-qualified for the position he seeks." *Coleman v. Casey Bd. of Educ.*, 510 F. Supp. 301, 303

(W.D. Ky. 1980).[43]

E. *Persons with Diabetes*

As of 1993 there were approximately 14 million Americans with diabetes.[44] Although the Court said in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483 (1999), that many who have diabetes are unimpaired in major life activities, state employers nonetheless engage in arbitrary discrimination by stereotyping all persons with diabetes without regard to whether their disease is under control. A bus driver whose diabetes had been under control since shortly after her diagnosis was barred from employment by a Pennsylvania regulation that forbids persons with diabetes who use medication from working as school bus drivers. *Commonwealth v. Tinsley,* 564 A.2d 286 (Pa. Commw. 1989). Although the court held the regulation unlawful, it has not been repealed. 67 Pa. Code

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[43] As licensors, states also discriminate by imposing across-the-board requirements of physical soundness without regard to whether a disability relates to the performance of an occupation. North Dakota requires that all nursing home administrators be "of sound physical and mental health." N.D. Cent. Code §43-34-03 (2000). In Connecticut, a variety of licenses may be suspended or revoked for any physical illness, without regard to its impact, *vel non*, on the license holder's performance of these professions. Conn. Gen. Stat. 385 § 20-227 (1999) (funeral home director); Conn. Gen. Stat. 371 § 20-29 (1999) (chiropractor); Conn. Gen. Stat. 384 § 20-202 (1999) (veterinarian); Conn. Gen. Stat. 386 § 20-238 (1999) (barber); Conn. Gen. Stat. 387 § 20-263 (1999) (hairdresser and cosmetician).

[44] Maureen J. Harris, *Summary, in* DIABETES IN AMERICA 1 (National Institutes of Health, NIH Publication No. 95-1468 2nd ed., 1995).

71.3(b)(4) (1998). A similar regulation in Wisconsin was struck down in *Bothum v. Department of Transp.*, 396 N.W.2d 785,786 (Ct. App. Wisc. 1986), under a state law that embodied the essence of Equal Protection analysis—that is, the regulation was not reasonably related to the person's ability to perform the job.

F. *Hearing Impairments*

Hearing loss affects nearly 10% of the U.S. population. About one and a half million Americans are deaf. When those who are deaf can secure work, employers frequently rate deaf and hard-of-hearing workers as better or about the same in task performance as hearing coworkers.[45] But often employers impose standards for aural acuity unrelated to job performance. For example, a deputy sheriff was discharged for a mild hearing loss that did not affect his ability to carry out his job.[46] Similarly, the City of Fairfax, Virginia utilized a national standard for hearing loss for firefighters that did not relate to the ability of the individual firefighter to perform.[47]

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[45] Cornell University, *Implementing the Americans With Disabilities Act: Working Effectively with Persons who are Deaf or Hard of Hearing* (April 1994).

[46] *In Re El Dorado County Sheriff's Dep't*, 1979 CAFEHC LEXIS 8 (Ca. F.E.H.C. Sept 6, 1979).

[47] Press Report, U.S. Department of Justice, Civil Rights Division, *Enforcing the ADA: A Press Report from the Dep't of Justice for the Mid-Atlantic Region,* available at http://www.usdoj.gov/crt/ada/pubs/reg3rpt.htm. (last updated June 27, 2000).

G. *Persons with Vision Impairments*

About 1 million Americans are considered legally blind.[48] Alternative techniques for performing tasks that do not rely on sight have made it possible for blind persons to perform most workplace tasks.

> It is no longer theory but established fact that, with proper training and opportunity, the average blind person can do the average job in the average place of business—and do it as well as his sighted neighbor . . . the skills of independent mobility, communication, and the activities of daily living are known, available, and acquirable.[49]

Despite the fact that the blind can hold most jobs, unfounded stereotypes persist. "In other words the real problem of blindness is not the blindness itself—not the acquisition of skills or techniques or competence. The real problem is the lack of understanding and the misconceptions which exist."[50]

While those with no mobility impairments can easily picture the utility and limitations of a wheelchair, sighted people often incorrectly assume the absence of non-visual alternative techniques to perform tasks for

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[48] Estimates of persons in the United States who are legally blind—defined as having corrected vision which is worse than 20/200—range from 750,000 to 1.1 million. *See* Yen-Pin Chiang, et al., *Federal Budgetary Costs of Blindness*, 70-2 The Millbank Quarterly 319-340 (1992).

[49] Kenneth Jernigan, *Blindness—Concepts and Misconceptions*, The Braille Monitor, 76 (Aug. 1965).

[50] *Id.*

which people with vision rely on sight. In noting that the paternalism of rehabilitation agencies is most severe with respect to the blind, one Congressman explained,

> blindness . . . is regarded almost universally as qualitatively different and far more crippling in its consequences than the run of physical disabilities or social disadvantages.

105 Cong. Rec. A1006-07 (1959) (Hon. Walter S. Baring).

The pervasiveness and persistence of these stereotypes are such that many sighted people would be surprised to discover that blind people safely use chain saws, scale cliffs and barbecue over hot coals.[51]

In the context of amendments to the Randolph-Sheppard Act, 20 U.S.C. §107(2000), one witness captured the vicious cycle that misconceptions about the blind have created:

> popular misconception about the 'helplessness' of blind persons . . . had existed for thousands of years. The misconceptions amounted to a self-fulfilling prophecy: Most people thought the blind were fit for little more than mendicancy; as a result of this attitude, the blind were not given the same employment opportunities as the sighted; and as a result of the lack of opportunities, all too many blind persons did in fact end up being dependent upon charity—or upon public welfare programs.

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[51] *See* Marc Maurer, *Children and Chain Saws*, *in* To Touch the Untouchable Dream 21 (Kenneth Jernigan, ed. 1993); Barbara Pierce, *Climb Every Mountain*, *in* Making Hay 109 (Kenneth Jernigan, ed. 1993); Marc Maurer, *Reflecting the Flame* 1 (1999).

> Franklin Roosevelt [who signed the Randolph-Sheppard Act] knew that this popular attitude was wrong and that there was no substantial or necessary basis for the myth about the 'helplessness' of the blind.[52]

The Philadelphia school system prohibited a blind English teacher from applying to teach sighted students. The Third Circuit concluded that her Fourteenth Amendment rights had been violated, noting that "[t]he very point of this case is that [by] denying [plaintiff] the opportunity to take a qualifying exam, the defendants deprived her of the opportunity to present evidence of her qualifications."[53] In 1978 the Supreme Court of Connecticut held unlawful the refusal of a school district to hire a blind teacher's aide pursuant to a policy which required teachers to have 20/20 vision. The decision, although on state law grounds, cast the school district's error in classic Fourteenth Amendment grounds: "classifying individuals by means of criteria irrelevant to the ultimate end sought to be accomplished . . . ."[54]

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[52] *Randolph-Sheppard Hearing, supra* note 6, at 63-64 (Charles W. Hoehne).

[53] *Gurmankin v. Costanzo*, 556 F.2d 184, 187 n.5 (3d Cir. 1977). While *Gurmankin* was decided under the irrebuttable presumption doctrine of *Cleveland Bd. of Educ. v. LeFleur*, 414 U.S. 632 (1974), a doctrine of debatable scope and vitality, the Third Circuit later noted that the Philadelphia school board's policy violated the Fourteenth Amendment, because it "was not rationally related to the legitimate state goal of assuring teacher competence." *Malmed v. Thornburgh*, 621 F.2d 565, 575 (3d Cir. 1980).

[54] *Connecticut Inst. for the Blind v. Connecticut Comm'n on Human Rights and Opportunities*, 405 A.2d 618, 621 (1978).

Discrimination flourishes, even in our legal institutions. Congress heard in 1985 about a blind lawyer who had worked for the Los Angeles County District Attorney's Office as a Senior Law Clerk. While Senior Law Clerks were hired with the understanding that those who passed the bar and had performed competently would be offered positions as Deputy District Attorneys, this lawyer was told that he would not, because he was blind.[55]

Richardson v. Purvis, 402 So.2d 910 (Ala. 1981) demonstrates well the irrationality that persons with disabilities so often face. The Sheriff of Mobile County hired a corrections officer, knowing he was blind in one eye. The officer had already performed this job for several years before the institution of a merit system, and all agreed that his loss of vision had had no detrimental effect on his performance. Even though the Sheriff believed, the County's examining physician concurred, and the "evidence was uncontradicted that Tillman's loss of vision . . . did not affect his ability to perform the duties of a correction officer," *id.* at 911, the personnel director of the county refused to affirm the hiring because of medical standards adopted by the Board to the contrary.

The impact of prejudice is severe: nearly three-quarters of working-age blind who want to work are unemployed.[56]

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[55] *1985 Civil Rights Hearings*, *supra* note 15, at 656-57 (statement of Stanley Fleishman).

[56] "Blind people today work as lawyers, psychologists, machinists, farmers, and hairdressers; but the best estimates indicate that 70% of those who are able to work still do not have jobs or work only a few days a month in sheltered workshops. Many

(continued...)

CONCLUSION

The experiences recounted here of irrational discrimination by public employers against persons with disabilities are, unfortunately, not anomalies. As different as these persons, their disabilities and their experiences are from each other, they all fall within a pattern of "discriminatory practices based on unfounded, outmoded stereotypes and perceptions and deeply embedded prejudices toward disabled people."[57] In testimony addressing the proposed Americans with Disabilities Act, Arlene Mayerson identified with precision the nature of this prejudice: "Over the years, the view of disabled people as incompetent and dependent upon charity, custodial care and protection [has become] firmly embedded in the public consciousness."[58]

As this brief demonstrates, the states, as employers, as licensors and as rehabilitators, share the prejudices of society at large. Arbitrary governmental action, however, is more pernicious than private discrimination: (1) it legitimates society's unfair consensus and (2) because such action is so often embodied in statutes and regulations, it is not easily remedied without litigation or concerted action. Such arbitrary and irrational action by state actors is precisely what the Fourteenth Amendment seeks to forbid. For these reasons, Congress was fully

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[56] (...continued)
thoroughly capable blind persons have never had a job." Daniel Finkelstein, *Blindness and Disorders of the Eye* 47 (Nat'l Federation of the Blind 1989).

[57] *1989 ADA Hearing, supra* note 26, at 74 (statement of Arlene Mayerson).

[58] *Id.* at 78.

justified in exercising its powers under that amendment to enact the Americans with Disabilities Act to redress these grievous wrongs.

Respectfully submitted,

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On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL COUNCIL ON DISABILITY IN SUPPORT OF RESPONDENTS

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL COUNCIL ON DISABILITY IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

This brief amicus curiae is filed, pursuant to consents of the parties filed with the Clerk,[1] on behalf of the National Council on Disability. The Council is an independent federal agency comprised of 15 members appointed by the President of the United States and confirmed by the U.S. Senate. Pursuant to its statutory mandate, 29 U.S.C. § 781 (1994), the Council is charged with reviewing federal laws, regulations,

[1] Pursuant to this Court's Rule 37.6, none of the parties authored this brief in whole or in part and no one other than amicus or counsel contributed money or services to the preparation and submission of this brief.

programs, and policies affecting people with disabilities, and making recommendations to the President, the Congress, officials of federal agencies, and other federal entities, regarding ways to better promote equal opportunity, economic self-sufficiency, independent living, and inclusion and integration into all aspects of society for Americans with disabilities.

The Council plays a major role in developing disability policy in America, and, in 1986, first proposed the concept of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.* (1990), the statute at issue in this case. In 1988, the Council developed the original ADA bill that was introduced in the 100th Congress. Congress relied on and acknowledged the influence of the Council and its reports during congressional consideration and passage of the ADA; members and staff of the Council testified at congressional hearings on the legislation. Under its current statutory mandate, the Council is responsible for gathering information about the implementation, effectiveness, and impact of the ADA. The Council is thus intensely interested in ensuring that the ADA is interpreted and implemented in a manner consistent with the purposes for which it was proposed. It is also uniquely qualified to provide the Court with information about the background and framing of the ADA, implementation of the Act, and other information concerning policy issues affecting persons with disabilities. The Council is particularly concerned with and distinctively informed about issues that are at the core of these cases -- the documented record of denials of equality and due process to individuals with disabilities by State and local governments, and the congruence and proportionality of the measures the ADA imposes on governmental entities to address and remedy the denials of equal protection and due process that people with disabilities have experienced and continue to experience.

SUMMARY OF ARGUMENT

The ADA was the culmination of 25 years of methodical congressional study, measured legislative steps, and finely

tuned negotiation regarding the problem of discrimination on the basis of disability and the appropriate remedies to address such discrimination. The careful, step-by-step consideration, unrivaled in civil rights law, that Congress afforded the issue of disability discrimination produced a solid legal and factual foundation for the ADA, engendered an enlightened and sophisticated congressional understanding of the nature and forms of discrimination on the basis of disability, and enabled Congress to devise, field-test, and refine moderate, workable remedies for such discrimination. Congress established *amicus*, in part, to assist with these efforts; consistent with its charge, *amicus* played a role in systematically examining such discrimination and federal laws addressing it and in making and explaining proposals, including, in particular, the ADA, for ameliorating such discrimination.

In the ADA, Congress made explicit findings both that discrimination on the basis of disability is pervasive, *i.e.*, diffused throughout every part, in American society, and that it persists in various particular areas of State functions and activities, including "access to public services" and employment. In making these findings, Congress had solid support in the documentation before it. Also based on a solid documentary foundation was Congress's belief that even though most States have laws prohibiting discrimination and establishing services and protections, the States are nonetheless engaged in widespread and serious discrimination on the basis of disability.

Congress was also on solid ground in its conclusion that State discrimination on the basis of disability has Fourteenth Amendment significance. In considering the ADA, Congress had before it a considerable body of case law holding various forms of State discrimination on the basis of disability to be violations of the Fourteenth Amendment. The Court's decision in *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), decision makes it abundantly clear that some types of discriminatory actions by governmental entities violate equal protection because they are not "rational." In

situations where, as with disability, "negative attitudes" and "irrational prejudice" toward a class of citizens have become the accepted practice and the standard way of dealing with those citizens, and have become ingrained in the policies, practices, and even the facilities of American society, including particularly State governments and their components, Congress is exercising a fundamentally important role under the Fourteenth Amendment when it identifies and prohibits such irrational actions.

Having identified a well-documented problem of State discrimination in violation of the Fourteenth Amendment, Congress negotiated extensively and crafted modest, congruent, and proportional remedies for irrational and unfair discrimination by States. Congress had good reason based on past experience to know that a broadly-worded prohibition of discrimination on the basis of disability would not be sufficient to address such discrimination. Because identical treatment can result in disability discrimination and because exclusion and other egregious deprivations on the basis of disability often occur in the absence of hostile animus, Congress elected to provide real equality, and not just a formal facade of equality, by establishing such ADA requirements as reasonable accommodation, barrier removal, auxiliary aids, proscribing standards or methods administration that have the effect of discrimination, and prohibiting of discriminatory qualification standards and selection criteria, all of which had been developed and tested under prior statutes and regulations.

These and other ADA provisions were carefully fine-tuned during protracted congressional consideration and debates, involving extensive negotiations and compromises. *Amicus* believes that, in contrast to its moderate original version of the ADA, in enacting the final version of the ADA Congress moved in the direction of crafting standards that are unnecessarily lenient and limited. The ADA's requirements and coverage certainly are not incongruous or

disproportionate in relation to the serious pattern of State discrimination they address.

ARGUMENT

I. The ADA Was the Culmination of 25 Years of Methodical Congressional Study of Discrimination on the Basis of Disability and the Appropriate Remedies to Address Such Discrimination.

As the Court has recognized,[2] the Americans with Disabilities Act (ADA) had its origin in a proposal of *amicus* the National Council on Disability.[3] As the ADA passed the Senate, Senator Dole observed:

> The ADA is . . . a good example of bipartisanship in action. The bill originated with an initiative of the National Council on Disability, an independent Federal body comprised of 15 members appointed by President Reagan and charged with reviewing all laws, programs, and policies of the Federal Government affecting individuals with disabilities. 135 CONG. REC. S 10790 (Daily Ed. Sept. 7, 1989) (remarks of Sen. Dole).

Amicus, in proposing the ADA, and the 101st Congress, in enacting it, based their actions on a quarter century of prior congressional investigation and documentation, and measured legislative steps -- extraordinarily extensive factfinding and investigation to establish a factual and legal foundation for enactment of the ADA.

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[2] *Sutton v. United Airlines*, 119 S.Ct. 2139, 2147-48 (1999) (recognizing the Council and its then staff person, the author of this brief, as having proposed and written the original version of the ADA).

[3] The Council was initially named the National Council on the Handicapped. Its name was changed to the National Council on Disability in 1988. Pub. L. No. 100-630, tit. II, § 205(a), 102 Stat. 3310 (1988).

A. Congressional Investigation and Information Base

1. Hearings

Congress held eighteen hearings to consider the ADA -- two in the 100th Congress and sixteen in the 101st [4] -- in addition to scores of congressional hearings over the years that examined discrimination on the basis of disability in various areas of activity, such as education, employment, transportation, housing, communications, residential treatment facilities, and public buildings.

2. Congressionally Commissioned Studies

In addition to its direct fact-gathering through its own investigation and hearing processes and the resources and compilations available to it through the Library of Congress and the Congressional Research Service,[5] Congress formally

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[4] *See* S. Rep. No. 101-116, at 4-5 (1989) (listing 4 committee and subcommittee hearings in 101st Cong., and a joint committee hearing in 100th Cong.); H.R. Rep. No. 101-485, pt. 2, at 24-28 (1990) (listing 4 committee and subcommittee hearings in 101st Cong., and a subcommittee hearing and a joint committee hearing in 100th Cong.); H.R. Rep. No. 101-485, pt. 3, at 24 (1990) (listing 4 committee and subcommittee hearings in 101st Cong.); H.R. Rep. No. 101-485, pt. 4, at 28-29 (1990) (listing 2 subcommittee hearings in 101st Cong.). The report of the House Committee on Public Works and Transportation, H.R. Rep. No. 101-485, pt. 1 (1990) does not describe its hearings, but two subcommittee hearings were held in the 101st Congress. *See Americans with Disabilities Act: Hearings on H.R. 2273 Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation*, 101st Cong. (1990).

[5] For example, three reports of the Congressional Research Service were cited as authority in amicus's report proposing the ADA. TOWARD INDEPENDENCE, App. at A-59 to A-60 (1986), citing Nancy Lee Jones, *Judicial Decisions Discussing "Program or Activity Receiving Federal Funds" Under Section 504 of the Rehabilitation Act Before and After Grove City College v. Bell*, Congressional Research Service, The Library of Congress (1985); Nancy Lee Jones, *Overview of Major Issues Under Section 504 of the Rehabilitation Act*, Congressional Research Service, The Library of Congress (1985); Nancy Lee Jones, *Proposed Coverage of Handicapped Persons By Title VII of the Civil Rights Act: An Analysis of*

sought additional information and recommendations by establishing, by statute or congressional appointment, several investigatory and advisory instrumentalities, and vesting them with responsibility for studying various facets of discrimination on the basis of disability and proposing ways to address and eliminate it.

These instrumentalities include:

(a) the National Commission on Architectural Barriers, established by statute and charged with studying the extent to which architectural barriers prevented access to public buildings and to propose measures to eliminate existing barriers and prevent new ones from being created, Vocational Rehabilitation Act Amendments of 1965, Pub. L. No. 89-333, 79 Stat. 1282 (1965);

(b) the White House Conference on Handicapped Individuals, whose statutory mission was to convene a national gathering "to develop recommendations and stimulate a national assessment of problems, and solutions to such problems, facing individuals with [disabilities]," with equal protection as a key focus, Pub. L. No. 93-516, §§ 300-306, at §§ 302, 301(4), 88 Stat. 1631 (1974), and which culminated in a May 1977 gathering in Washington, DC of approximately 3,700 individuals from every state and U.S. territory, representing over 100,000 people who attended local, state, and territorial conferences, that generated 815 formal recommendations addressing 287 issues;

(c) the U.S. Commission on Civil Rights, which was given jurisdiction over disability discrimination in 1978, Pub. L. No. 95-444, 92 Stat. 1067 (1978), and which, in 1983, published ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES (hereinafter ACCOMMODATING THE SPECTRUM), a comprehensive report on discrimination on the basis of disability which documented the types of discrimination

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H.R. 370, Congressional Research Service, The Library of Congress (1985).

people with disabilities encounter and provided a summary of case law and a conceptual framework for understanding and addressing such discrimination, that has been cited by the Court as authority regarding the nature of such discrimination, *Alexander v. Choate*, 469 U.S. 287, 295-96, nn. 12 & 16 (1985);

(d) *amicus*, the National Council on Disability, which Congress established in 1984 as an independent federal agency charged with reviewing federal laws and programs affecting people with disabilities and making recommendations regarding ways to make such laws and programs more effective, Pub. L. No. 98-221, tit. I, § 142, 98 Stat. 27 (1984), codified as amended at 29 U.S.C. § 781, and which in two of its reports to the President and Congress first proposed the concept of an ADA and then published the original draft of the ADA that was later introduced in Congress in 1988, NATIONAL COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE 18-21 (1986) (hereinafter TOWARD INDEPENDENCE); NATIONAL COUNCIL ON THE HANDICAPPED, ON THE THRESHOLD OF INDEPENDENCE 27–39 (Andrea H. Farbman ed., 1988) (hereinafter ON THE THRESHOLD OF INDEPENDENCE); S. 2345, 100th Cong., 2d Sess., 134 CONG. REC. 9379-9382 (1988); H.R. 4498, 100th Cong. 2d Sess.; *see* 134 CONG. REC. 9599-9600 (1988) (statement of Rep. Coelho);

(e) the Advisory Commission on Intergovernmental Relations, a bipartisan body (comprised of three U.S. Senators, three members of the House of Representatives, three officials from the U.S. Executive Branch, four governors, four mayors, three members of State legislatures, three elected county officials, and three private citizens), Pub. L. No. 86-380, 73 Stat. 703 (1959), which in 1989 issued a report titled DISABILITY RIGHTS MANDATES: FEDERAL AND STATE COMPLIANCE WITH EMPLOYMENT PROTECTIONS AND ARCHITECTURAL BARRIER REMOVAL that identified various barriers to governmental compliance with disability rights mandates, and was based in part on a survey of State officials

regarding their assessment of impediments to employment of persons with disabilities in State government, *id.* at 2, 72-73;

(f) the General Accounting Office (GAO), which, in response to a request by members of Congress, during congressional consideration of the ADA in January 1990, for information about the costs of workplace accommodations and of avoiding or removing architectural, transportation, and communication barriers, conducted a literature review of published studies, queried a wide range of industry groups and disability organizations, identified twelve reports that provided such information, and summarized their findings, U.S. General Accounting Office, *Persons with Disabilities: Reports on Costs of Accommodations*, A Briefing Report to Congressional Requesters, at 12, 11-25 (January 4, 1990); and

(g) the Task Force on the Rights and Empowerment of Americans with Disabilities, appointed in May 1988 by the Chairman of the House Subcommittee on Select Education to gather information on the extent and nature of disability discrimination, which conducted 63 public forums around the country attended by over 7,000 persons, submitted eleven interim reports to Congress, provided testimony at hearings on the ADA in both the House and Senate,[6] issued a final report, *From ADA to Empowerment; The Report of the Task Force on the Rights and Empowerment of Americans with Disabilities* (1990) (hereinafter *From ADA to Empowerment*), and concluded generally that Americans with disabilities face

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[6] *See* S. Rep. No. 101-116, at 4, 6, 8-9, 16, 17 (1989); *Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Senate Committee on Labor and Human Resources and the Subcommittee on the Handicapped*, 101st Cong. at 18-20, 252-58 (1989); H.R. Rep. No. 101-485, pt. 2, at 25, 26, 27-28 (1990); *Americans with Disabilities Act of 1988: Hearing on H.R. 4498 Before the Subcommittee on Select Education of the House Committee on Education and Labor*, 100th Cong. at 1038-43, 1328-35 (1988); *From ADA to Empowerment: The Report of the Task Force on Rights and Empowerment of Americans with Disabilities*, at 18 (1990).

"massive, society-wide discrimination and paternalism," *id.* at 18, 19.

The statutory and other sources of authority of these entities, a description of their missions, the titles of their principal relevant reports, and a summary of their overall pertinent results are presented in tabular form in the Appendix to this brief. Together, they represent a powerful, twenty-five year effort undertaken by Congress to commission sustained investigation into the nature and scope of discrimination on the basis of disability and to identify workable measures for addressing it.

3. Other Resources Before Congress

In addition to legislatively generated information and documents, *amicus,* in developing its ADA proposal, and Congress, in its consideration of the legislation, had the benefit of a variety of other informational resources. Among these were three documents that Congress expressly relied on: (1) *Report of the Presidential Commission on the Human Immunodefiency Virus Epidemic* (1988) (discussed the widespread prevalence and serious repercussions of baseless discrimination encountered by those with HIV, and expressly endorsed *amicus*' ADA proposal, *id.* at 119-123); (2) Louis Harris and Associates, *The ICD Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream*, (1986) (presented results of first nation-wide, telephone survey of Americans with Disabilities, including wide array of statistical information about the incomes, job status, and other characteristics, activities, and viewpoints of people with disabilities; among findings were that approximately two-thirds of individuals with disabilities of working age were not working, and that two-thirds of those not working want to work, *id.* at 47, 50-51); and (3) Louis Harris and Associates, *The ICD Survey II: Employing Disabled Americans*, (1987) (provided data from Harris survey of employers' policies, practices, and attitudes of employers. The Harris agency reported that three-fourths of managers of businesses affirmed that people with disabilities

"often encounter job discrimination from employers." *Id.* at 12.

4. Overall Documentary Base for the ADA

ADA committee reports expressly cite seven documents as providing support for congressional conclusions regarding the nature and extent of discrimination on the basis of disability: *amicus*' TOWARD INDEPENDENCE (1986) and ON THE THRESHOLD OF INDEPENDENCE (1988); the U.S. Commission on Civil Rights report ACCOMMODATING THE SPECTRUM (1983); the two Harris polls; the *Report of the Presidential Commission on the Human Immunodefiency Virus Epidemic* (1990); and *From ADA to Empowerment*, the report of the Task Force on the Rights and Empowerment of Americans with Disabilities. S. Rep. No. 101-116, at 6 (1989); H.R. Rep. No. 101-485, pt. 2, at 28 (1990). The cited documents, however, themselves refer to and build upon the whole body of information about discrimination on the basis of disability and ways to address it developed and relied on in Congress' twenty-five years of study and documentation of these issues.

B. In Enacting the ADA, Congress Addressed a Documented Pattern of Discrimination by States That Falls Within Its Power to Enforce the Fourteenth Amendment.

1. Congress Addressed a Documented Pattern of Discrimination by the States.

The petitioners contend that in enacting the ADA Congress did not address a "predicate" of discriminatory conduct by the States. Petitioners' Br. at 30. Both the statutory language and the documentation and legislative record Congress had before it fly in the face of this contention.

a. Congressional Findings

Petitioners' brief argues, emphatically, that "[n]ot one instance of such conduct is identified, whether in the findings

and purpose section of the law or in any other Title of the Act." Petitioners' Br. at 31. The legal relevance of petitioners' assertion is dubious, as this Court has never stated that the constitutional basis for a congressional enactment must be explicitly spelled out in Findings, Purposes, or the body of a statute.

Even if petitioners' contention had legal significance, however, it is manifestly not accurate. Congress not only mentioned several forms of State discrimination in its findings, but it went much further and found that discrimination on the basis of disability is "pervasive" in America. 42 U.S.C. § 12101(a)(2). The word "pervasive" means "diffused throughout every part of," WEBSTER'S NEW COLLEGIATE DICTIONARY (7th Edition 1967) at 631, or "extending throughout," WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE (1989) at 1076. It makes no sense for petitioners to contend that "pervasive" discrimination does not encompass the States.

Moreover, Congress left no doubt about the role of States as major discriminators when it made a specific finding that "discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. § 12101(a)(3). Significantly, in finding that discrimination persists in the area of "access to public services," Congress laid a solid "predicate" for its enactment of Title II of the ADA. Title II is titled "Public Services" and applies to the "services, programs, or activities of a public entity," a term which is defined to mean "any State or local government" or their instrumentalities. 42 U.S.C. §§ 12132, 12131(1)(A) & (B). Among the other areas of discrimination expressly identified by the Congress in the finding, discrimination in voting and institutionalization involve activities attributable exclusively to State and local governments; education and transportation are functions in which State and local governments play

predominant roles; and employment, communication, recreation, and health services are all areas in which the States are significantly involved and thus share with other nongovernmental entities responsibility for the widespread discrimination Congress identified.

b. Documentation of State Discrimination

In making a finding that discrimination on the basis of disability was "pervasive," Congress had solid support in the documentation before it. *See* ON THE THRESHOLD OF INDEPENDENCE at 27, § 2(a)(2) ("discrimination against persons with disabilities continues to be a serious and pervasive social problem"); TOWARD INDEPENDENCE, App. at A-3 ("severity and pervasiveness of discrimination against people with disabilities is well-documented)"; ACCOMMODATING THE SPECTRUM at 159, Conclusion 1 ("discrimination against handicapped persons continues to be a serious and pervasive social problem"); Task Force on the Rights and Empowerment of Americans with Disabilities, *From ADA to Empowerment* at 16 ("overwhelming evidence" of "massive, society-wide discrimination . . ."); U.S. COMMISSION ON CIVIL RIGHTS, CIVIL RIGHTS ISSUES OF HANDICAPPED AMERICANS: PUBLIC POLICY IMPLICATIONS, 40 (1980) (Statement of Charles W. Hoehne, spokesperson for the White House Conference) (White House Conference reports make it "very plain that individuals with disabilities have been and continue to be . . . subjected to massive discrimination in this country").

Also well-documented was the existence of widespread discrimination in various categories of State activities. In *Accommodating the Spectrum*, the Commission on Civil Rights examined various categories of activities in some detail and noted extensive and well-documented discrimination in regard to public education systems,[7]

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[7] *Id.* at 27-29.

confinement in public residential institutions,[8] involuntary sterilizations pursuant to State laws,[9] inaccessible public transportation terminals and vehicles,[10] and inaccessible public buildings.[11]

In discussing the latter, the Commission effectively refuted the petitioners' arguments that Congress could not have addressed a pattern of State discrimination on the basis of disability since many States have laws prohibiting such discrimination. Petitioners' Br. at 31-33. The Commission noted the sharp divergence between the sentiments expressed in State legislation and the actual reality:

> Despite . . . the fact that nearly every State has a statute prohibiting architectural barriers, such barriers continue to be a serious problem. The extent of inaccessibility was illustrated by a 1980 study of State-owned buildings housing services and programs available to the general public. The study found 76 percent of the buildings physically inaccessible by and unusable for serving [persons with disabilities], even when taking into account the option of moving programs and services to other parts of the buildings or otherwise restructuring them.[12]

See also WHITE HOUSE CONFERENCE ON HANDICAPPED INDIVIDUALS, VOLUME THREE: IMPLEMENTATION PLAN 61 (1978) ("The entire conference record overwhelmingly

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[8] *Id.* at 32-35.

[9] *Id.* at 36-37.

[10] *Id.* at 39.

[11] *Id.* at 38-39.

[12] ACCOMMODATING THE SPECTRUM at 38-39, citing Noakes Associates Architects, *Access Maryland: Handicapped Accessibility Survey* (prepared under State contract) (1980), p. 17.

reflects that formal articulation of a right is one matter; the general enjoyment of that right is quite another.").[13]

The Commission on Civil Rights also listed, with extensive footnotes identifying sources in case law and professional literature, other practices involving the laws of States and activities of State officials in which persons with disabilities "are frequently denied other rights and opportunities that [nondisabled] persons take for granted." *Accommodating the Spectrum* at 39-40. These included the right to vote, to hold public office, to obtain a driver's or a hunting and fishing license, to marry and to enter into contracts, and to retain custody of their children. *Id.* at 40.[14]

The Civil Rights Commission did not discuss public employment separately due to its conclusion that employment was one of the areas in which "pervasive" discrimination "persists." *Id.* at 159, Conclusion 1. The Advisory Commission on Intergovernmental Relations (ACIR) report, however, presented specific documentation on State employment. En route to its findings that barriers to

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[13] Likewise, the congressional Task Force on the Rights and Empowerment of Americans with Disabilities found that "[t]raditional attitudes have resulted in widespread laxity in the implementation of existing disability rights and services legislation." *From ADA to Empowerment* at 20.

[14] Recognizing that a discussion of all facets of discrimination on the basis of disability was "beyond the scope of" its report, *id.* at 40, the Commission added an appendix in which it provided an outline of many areas of discrimination. In addition to areas of State discrimination already mentioned, the Appendix lists discriminatory competency and guardianship laws, *id.*, App. A, item V; denials of access to public housing, *id.*, App. A, item VII.1; discriminatory zoning obstacles, *id.*, App. A, item VII.2; overly protective fire codes and other regulations, *id.*, App. A, item VII.5; and inequities in the criminal justice system regarding the apprehension, questioning, trial, and post-conviction treatment of persons with disabilities, *id.*, App. A, item VII.5. The Commission cautioned that the areas of discrimination listed were "not exhaustive." *Id.* at 165.

government compliance with disability rights mandates include "negative employer attitudes about persons with disabilities, agency fear of the costs involved in accommodating disabled persons, lack of information about what works and what does not work, [and] unawareness of cost-effective methods of meeting mandates," ACIR, DISABILITY RIGHTS MANDATES: FEDERAL AND STATE COMPLIANCE WITH EMPLOYMENT PROTECTIONS AND ARCHITECTURAL BARRIER REMOVAL at 2, Finding 5 (1989), ACIR reported on a survey of State officials it had conducted. The results of the survey indicated that 83% of the survey respondents reported that negative attitudes toward and misconceptions about people with disabilities had a moderate or strong impact on State employment of persons with disabilities, and 68% said that the lack of leadership support and commitment to employment of persons with disabilities was a strong or moderate impediment to such employment. *Id.* at 72, Table 6-10.

Likewise, the Task Force on Rights and Empowerment of Americans with Disabilities report highlighted various examples of discrimination reported to the Task Force, including a city bus driver with mental illness who was repeatedly harassed, ridiculed, and pressured to resign by his supervisor because of his disability, *From ADA to Empowerment* at 22; a young man employed as a laborer by a State Conservation Corps subjected to workplace harassment and public ridicule by his superior because of his mental retardation, *id.* at 21; a career army/reserve/national guard officer was terminated with no benefits from the Alabama National Guard when it was learned that he had been diagnosed with depression and anxiety some 25 years earlier, *id.*

Accordingly, in the ADA, Congress found, based upon extensive prior study and documented evidence, that discrimination on the basis of disability is a "serious and pervasive problem" in America, and that the States were major perpetrators of such discrimination.

2. The Documented Pattern of Discriminatory State Actions Warranted Legislative Action Under Congress's Section 5 Authority.

In calling for a comprehensive equal opportunity law in 1986, *amicus* termed discrimination on the basis of disability "the antithesis of equal opportunity," TOWARD INDEPENDENCE, App. at A-3, and quoted President Reagan's declaration that "[o]ur Nation's commitment to equal protection of the laws will have little meaning if we deny such protection to those who have not been blessed with the same physical or mental gifts we too often take for granted." *Id.* at A-4, quoting R. Reagan, *Memorandum to the Attorney General*, April 30, 1982.

In authorizing the White House Conference, Congress had made "equality of opportunity, equal access to all aspects of society, and equal rights guaranteed by the Constitution" a major focus. Pub. L. No. 93-516, § 302, 88 Stat. 1631 (1974). The White House Conference reported back that "[a] review of past and current treatment of [individuals with disabilities] by all branches of government at all levels has, however, revealed an apparent utter disregard or distortion of these basic principles." WHITE HOUSE CONFERENCE ON HANDICAPPED INDIVIDUALS, SPECIAL CONCERNS: STATE WHITE HOUSE CONFERENCE WORKBOOK, 59 (U.S. Dept. of Health, Education, and Welfare, Office of Human Development, undated).

In considering the ADA, Congress had before it a considerable body of case law holding various forms of State discrimination on the basis of disability to be violations of the Fourteenth Amendment. In an extensive discussion of the constitutional litigation addressing discrimination on the basis of disability, the Commission on Civil Rights noted that "[t]he most frequently used constitutional bases are the guarantees of equal protection of the law and due process of the law," and devoted some four pages of its ACCOMMODATING THE SPECTRUM report to discussing the implications of the Fourteenth Amendment guarantees of equal protection of the

law and due process of law to discrimination on the basis of disability. *Id.* at 62-66.

The Commission observed that both the equal protection and due process clauses had been successfully used in litigation to secure rights for people with disabilities. *Id.* at 62, 64. The report discussed Fourteenth Amendment cases in which plaintiffs had been successful in: (1) winning the right to equal public education opportunities; (2) challenging commitment procedures and conditions of confinement in mental institutions; (3) challenging State laws permitting criminal defendants deemed mentally incompetent to be confined indefinitely without trial; (4) challenging restrictions in public employment opportunities; (5) establishing a right of persons involuntary committed to mental retardation facilities to reasonably safe conditions, freedom from unreasonable bodily restraints, and minimally adequate training; (6) challenging restrictions upon voting rights of persons with mental retardation; (7) challenging legal restrictions based on disability in occupancy of hotels and boarding houses; (8) challenging statutes authorizing involuntary psychosurgery and shock therapy; (9) challenging statutes authorizing termination of parental rights; (10) challenging involuntary sterilization procedures; and (11) challenging State institutions' decision-making procedures regarding life-prolonging medical procedures. *Id.* at 63-66.

See also WHITE HOUSE CONFERENCE ON HANDICAPPED INDIVIDUALS, SPECIAL CONCERNS: STATE WHITE HOUSE CONFERENCE WORKBOOK, at 59 (presenting a similar list of area in which people with disabilities had sued to vindicate rights); U.S. COMMISSION ON CIVIL RIGHTS, CIVIL RIGHTS ISSUES OF HANDICAPPED AMERICANS: PUBLIC POLICY IMPLICATIONS at 39 (Statement of Charles W. Hoehne, spokesperson for White House Conference) ("[a] growing body of judicial decisions is establishing that constitutional guarantees of equal protection and due process extend to [individuals with disabilities]").

The discussion of Fourteenth Amendment litigation challenging discrimination on the basis of disability in ACCOMMODATING THE SPECTRUM, while extensive, was not exhaustive either at the Supreme Court level or otherwise. And such court decisions continued in the period between the issuance of ACCOMMODATING THE SPECTRUM in 1983 and the passage of the ADA in 1990, the most significant of which, for present purposes, was *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), in which the Court held that a zoning board's denial of special exception to permit a group home for persons with mental retardation in a residential neighborhood was irrational and violated the Fourteenth Amendment. The *Cleburne* ruling was discussed in *amicus*'s analysis of its original proposal to Congress that an ADA should be enacted. TOWARD INDEPENDENCE, App. at A-7. The *Cleburne* decision makes it abundantly clear that some types of discriminatory actions by governmental entities violate equal protection because they are not "rational."

Petitioners rely strongly on the fact that this Court ruled in *Cleburne* that persons with mental retardation do not constitute a suspect class. Petitioners' Br. at 25-27. *Amicus* believes that exclusions and deprivations visited upon people because of their disabilities should be accorded some degree of heightened scrutiny because such disadvantageous treatment is often, as the Court observed in *Cleburne*, the product of "negative attitudes," "fear," and "irrational prejudice." *Cleburne*, 473 U.S. at 448, 450. But, as *Cleburne* demonstrates, State actions that discriminate on the basis of disability can violate the Fourteenth Amendment without heightened scrutiny.

The implication of Petitioners' analysis is that Congress has no role to play in addressing classifications that are not subject to heightened scrutiny under the equal protection clause. But in situations where, as with disability, "negative attitudes" and "irrational prejudice" toward a class of citizens have become the accepted practice and the standard way of dealing with those citizens, and have become ingrained in the

policies, practices, and even the facilities of American society, including particularly State governments and their components, Congress is exercising a fundamentally important role under the Fourteenth Amendment when it identifies and prohibits such irrational actions.

II. In Considering and Passing the ADA, Congress Negotiated and Crafted Modest, Congruent, and Proportional Remedies for Irrational and Unfair Discrimination on the Basis of Disability.

A. The ADA Prohibits Irrational and Unfair Discrimination by the States.

The ADA was concerned with prohibiting "unnecessary" and "unfair" unequal treatment of people with disabilities. 42 U.S.C. § 12101(a)(9). *See also* TOWARD INDEPENDENCE, App. at A-3 ("Discrimination consists of the unnecessary and unfair deprivation of an opportunity because of some characteristic of a person. It is the antithesis of equal opportunity."); *id.* at 19 ("unfair or unnecessary exclusion or disadvantage").

Congress understood that, except in those limited circumstances where disability actually prevents participation, excluding individuals based on disability is intrinsically irrational and unfair, and that lesser types of discrimination prohibited by the ADA -- such as unjustified segregation; relegation to lesser services, programs, activities, benefits, jobs, or other opportunities; and overprotective rules and policies -- are irrational because they penalize people for a characteristic that they are unable to change and that does not inherently prevent them from participating on an equal basis. Thus one of the ADA findings was that "individuals with disabilities . . . have been faced with restrictions and limitations . . . based on characteristics that are beyond the control of each individual and resulting from stereotypic

assumptions not truly indicative of the individual ability of such individuals to participate . . ." 42 U.S.C. § 12101(a)(7).[15]

In addition, exclusions and relegations to lesser status and opportunities on the basis of disability usually occur without the opportunity for the person being excluded or disadvantaged to be heard to challenge the unequal treatment as unfair and unnecessary. This, along with the "fundamental unfairness" involved in many instances of State actions disadvantaging people because of their disabilities, raises substantial due process concerns.

Congress concluded that irrational denials of equality by state actors violate the Equal Protection Clause of the Fourteenth Amendment. And state and local government's arbitrary and summary deprivations of substantial rights and opportunities without a chance to be heard in opposition violate due process requirements of procedural protections and "fundamental fairness."

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[15] Discrimination by the States carries an extra element of irrationality, because of the States' fiscal and legal responsibilities. Denials of public employment opportunities, or of employment-related services such as public transportation or job training programs, because of potential workers' disabilities, bring with them a statistically strong likelihood that the State will end up paying income support for jobless people with disabilities, as well as losing potential income tax revenue the individuals would have paid if employed, and potential sales tax revenue from their spending if they had been employed. Financial consequences were frequent considerations during ADA deliberations. *See*, e.g., 42 U.S.C. § 12101(a)(9) (ADA finding that "the continuing existence of unfair and unnecessary discrimination and prejudice . . . costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity"; TOWARD INDEPENDENCE at vi (estimating annual federal expenditures for disability at over $60 billion); *FROM ADA TO EMPOWERMENT* at 27 (quoting President Bush's estimate that "when you add together federal, state, local, and private funds, it costs almost $200 billion annually to support Americans with disabilities -- in effect to keep them dependent").

B. Simply Proscribing Intentional Differential Treatment Because of Disability Would Achieve a Mere Facade of Formal Equality, Not Real Equality in the Form of Meaningful Equal Opportunity.

One of the key lessons that Congress derived from its twenty-five years of study and field-testing[16] of disability nondiscrimination laws was that a broadly-worded prohibition of discrimination on the basis of disability -- a simple requirement that "Thou shalt not discriminate" -- is not sufficient to address such discrimination. Congress enacted the ADA with an express purpose "to provide clear, strong, consistent, and enforceable standards addressing

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[16] Key elements of the nondiscrimination requirement, such as reasonable accommodation, auxiliary aids, and restrictions on disability inquiries, were initially developed and field-tested in federal regulations issued, with the benefit of formal public comment, under Sections 501, 503, and 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 791, 793, & 794a. Similarly, the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat.1619, broke new ground in establishing a statutory "reasonable accommodation" requirement, 42 U.S.C. § 3604(f)(3)(B), prohibiting discrimination against someone because he or she associates with a person who has a disability, *id.* §§ 3604(f)(2)(B)-(C), and imposing accessibility standards on the design and future construction of covered facilities, *id.* § 3604(f)(3)(C) – all concepts that would play important roles in the ADA.

Regarding the coverage of State and local governments, the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988), added a definition of "program or activity" to, inter alia, Section 504 of the Rehabilitation Act of 1973. The amended definition expanded Section 504's coverage of State and local government bodies by clarifying that all of the operations of a department or agency that receives federal funds are covered, regardless of how separate they may be from the federally assisted project or activity; and that if a state or local department or agency receives federal funds to be distributed to other departments or agencies, both the entity that distributes the funds and the entities that receive the funds are covered. 29 U.S.C. §§ 794(b)(1)(A)-(B). *SEE* S. REP. NO. 64 100th Cong., 2d Sess. 16 (1988) (Labor and Human Resources Committee), reprinted in 1988 U.S.C.C.A.N. 3, 18.

discrimination against individuals with disabilities," 42 U.S.C. § 12101(b)(2).

In going beyond an ineffective, broad renunciation of inequality on the basis of disability, Congress put into action what it had learned about the nature and forms of disability discrimination during its quarter century of study. Petitioners urge, however, that the ADA's "disparate-effect and reasonable-accommodation requirements far exceed the minimal strictures of rational-basis review." Petitioners' Br. at 29.[17] This contention reflects a superficial misunderstanding of these ADA requirements and their role in eliminating irrational and unfair discrimination. Both of the cited provisions demand no more of States than rational and fair conduct. It should be noted, however, that even if a particular requirement of the statute did exceed the limits of congressional authority to some degree, that would only justify a judicial restriction or excision of the overextended portion of the provision, particularly since the ADA contains a severability provision. 42 U.S.C. § 12213. It would not invalidate congressional authority to regulate the extensive

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[17] Petitioners also mention the ADA requirement on a State "to make 'reasonable modifications' in its public services to accommodate the disabled unless they would 'fundamentally alter' the nature of the program." Petitioners' Br. at 29. It may be helpful to clarify, however, that the potentially more difficult or expensive types of undertakings -- physical and structural modifications and providing equipment, devices, or assistive personnel -- are not required under this provision, but are covered in the program accessibility section of the regulations as either facility accessibility modifications, 28 C.F.R. §35.150, or as "auxiliary aids," *id.*, § 35.160(b)(1). In both cases, the obligation is subject to a defense that excuses covered entities from taking any action that causes "undue financial and administrative burdens." *Id.*, §§ 35.150(a)(3), 35.164. The "reasonable modifications" provision referred to by the Petitioners addresses less difficult and less potentially costly modifications to "policies, practices, and procedures" to permit a particular individual with a disability to participate equally. *Id.* § 35.130(b)(7). Typically, these involve relaxation of or an exception to some general rule or policy that would otherwise operate to exclude a qualified individual from participation.

remaining areas of States' conduct that do fall within Congress's section 5 authority.

1. Identical Treatment Can Result in Discrimination.

A meeting of a city council may be "equally open to all" in one sense, but if it is held in an auditorium that can only be entered by going up a flight of stairs it offers no chance of equal participation for a person who uses a wheelchair. A blind person who has rushed to a public hospital for a medical emergency may have an "equal" opportunity to receive the "informed consent" documents describing risks of treatment, but the gesture will not have any real meaning if there is no one who will read the documents to the patient or make them available in an alternative format. Verbal instructions regarding a State civil service test may be articulated "equally" to all, but will be of no avail to a test-taker who is deaf. These are simple examples of the fact that treating everyone identically and ignoring the existence of disabilities may appear to treat all persons the same, but would in fact represent drastic denials of equality to some people because of their disabilities. As the Civil Rights Commission has noted, "[s]uch an approach [of identical treatment] would give the form, but not the substance of equal opportunity." ACCOMMODATING THE SPECTRUM at 99.

In *Alexander v. Choate*, *supra*, the Court indicated that, in the context of Section 504 in its application to state activities, "meaningful access" was required, and that "to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made." 469 U.S. at 301. ADA Committee reports indicate expressly that Title II's prohibition of discrimination on the basis of disability is to be interpreted consistently with the decision in *Alexander v. Choate*. S. Rep. No. 101-116, at 44 (1989); H.R. Rep. No. 101-485, pt. 2, at 84 (1990). For the ADA to provide real equality, therefore, such requirements as reasonable accommodation, barrier removal, and auxiliary aids had to be essential components; identical treatment would not suffice.

2. Exclusion and Other Egregious Deprivations on the Basis of Disability Often Occur in the Absence of Hostile Animus.

The Court made an observation in *Alexander v. Choate*, 469 U.S. 287 (1985), in the context of Section 504 that is equally true in the Fourteenth Amendment context of the ADA: "much of the conduct that Congress sought to alter ... would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent." *Id.* at 296-97. The Court cited architectural and transportation barriers as examples of forms of discrimination that needed to be eliminated whether or not they were erected with an intent of excluding people with disabilities. *Id.* at 297. Simply proscribing intentional differential treatment on the basis of disability would leave in place most of the barriers, practices, and policies that deprive people of equal participation in State services, programs, and job opportunities because of disability.

To a person who uses a wheelchair and is confronted by a flight of stairs that makes it impossible to enter the State employment application office, it makes no difference whatever whether those stairs were designed and constructed with a deliberate intent to keep people in wheelchairs out or whether they were designed and constructed without any thought at all about their effect on persons who use wheelchairs. A law that sought to enforce equality by declaring only the provably intentional barriers illegal would miss the mark almost entirely, because it would be a rare case in which the designers and constructors of State facilities would generate documentation or demonstrable evidence that they were openly hostile to people who use wheelchairs.

Other language of the Court in *Alexander v. Choate* indicates that, while "well-cataloged instances of invidious discrimination" against the disabled exist, *id.* at n.12, discrimination on the basis of disability may be the result of apathetic attitudes rather than affirmative animus," *id.* at 296. Nevertheless, treatment of people with disabilities is "one of

the country's 'shameful oversights'" and constitutes "glaring neglect," *id.*, quoting 117 CONG. REC. 45974 (1971) (statement of Rep. Vanik) and 118 CONG. REC. 526 (statement of Rep. Percy). Such inattention is not a neutral, rational act; it is based upon prejudice, stereotypes, and callous indifference -- an assumption that people with disabilities will not participate.[18]

For State and local governments to ignore the existence of people with disabilities in planning and structuring their services and programs, and in designing and erecting their facilities, goes well beyond inadvertence and simple negligence and amounts to reckless indifference or a form of intentionality -- a looking away and denying the existence of persons with disabilities in the face of abundant evidence to the contrary.[19]

People with disabilities are inevitably part of the citizenry whom state and local governments are charged with serving, many of which are taxpayers for such services. It is totally foreseeable that some potential public workers will, because of disabilities, need reasonable adjustments to workplaces designed, with one-size-fits-all assumptions, for those without disabilities. It is totally foreseeable that some capable and qualified workers with respiratory and other conditions will be needlessly excluded if a State agency

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[18] One of the Conclusions of the Commission on Civil Rights was that "[a]lthough open hostility is now rare, prejudice against [people with disabilities], manifested as discomfort, patronization, pity, stereotyping, and stigmatization, remains common." ACCOMMODATING THE SPECTRUM at 159, Conclusion 2.

[19] *See*, e.g., Task Force on the Rights and Empowerment of Americans with Disabilities, *From ADA to Empowerment*, 19 (1990) (Task Force finding that "[d]isability has become a predictable part of the normal life cycle for a large and increasing proportion of human beings.") In the words of one federal statute, "disability is a normal part of the human experience . . ." 29 U.S.C. § 701(a)(3), as amended by Pub. L. No. 102-569, tit. I, §101, 106 Stat. 4346.

unnecessarily allows carbon monoxide fumes in its vehicles and cigarette smoke in its work facilities, as is alleged by Mr. Ash in this case.

Moreover, an effective law prohibiting unfair and irrational discrimination must require the dismantling of practices and structures excluding or disadvantaging persons with disabilities that are "literally been built into the physical environment," TOWARD INDEPENDENCE, App. at A-3, or in the accepted policies and practices of agencies that have a tendency to endure, often outliving their original rationale, in the tradition of "things have always been done that way." ACCOMMODATING THE SPECTRUM at 91. A prejudiced, erroneous belief that deaf people cannot drive safely or that blind people cannot be attorneys may be perpetuated in a formal rule or an unwritten policy, and may guide the actions of a State agency long after the originator of the rule or policy has left the agency or died. Such entrenched mechanisms of discrimination continue to operate without regard to whether any current or prior intent to discriminate can be proven.

C. Congress Negotiated and Crafted Modest, Congruent, and Proportional Requirements and Coverage.

Congress understood that something beyond simply treating everyone exactly the same and ignoring the existence of disabilities was necessary to address disability discrimination, particularly since "[s]ociety's operations -- from its sidewalks to its schoolrooms and its jobs -- ordinarily are designed for people whose abilities fall in the `normal' range," and "exclude or seriously disadvantage" people not within the "normal" range. ACCOMMODATING THE SPECTRUM at 161, Conclusion 4. This recognition led Congress to include in the ADA key provisions, including the requirement of reasonable accommodations, the requirement of barrier removal, proscribing standards or methods administration that have the effect of discrimination, the requirement of providing auxiliary aids, and the prohibition of discriminatory qualification standards and selection criteria, all of which had

been developed and "test-driven" under prior statutes and regulations. In Congress' view, a rational public entity would take such reasonable steps to assure meaningful equal participation of individuals with disabilities in all of its jobs, programs, and activities. The reasonable accommodation provision, for example, only requires States to make *reasonable* modifications to "known" limitations and does not require any action that would impose an "undue hardship." 42 U.S.C. § 12112(b)(5)(A). For government entities which provide various accommodations designed for employees and constituencies without disabilities[20] to refuse to make reasonable modifications and take other reasonable steps to permit the equal participation of citizens with disabilities is irrational and manifestly unfair.

These provisions were carefully fine-tuned during extensive congressional consideration and debates. For a description of negotiations and compromises, *see, e.g.*, 135 CONG. REC. S 10713 (Daily Ed. Sept. 7, 1989) (statement of Sen. Harkin); 136 CONG. REC. S 9686 (Daily Ed. July 13, 1990) (statement of Sen. Harkin); 135 CONG. REC. S 10715 (Daily Ed. Sept. 7, 1989) (statement of Sen. Hatch).; 136 CONG. REC. H 2429 (Daily Ed. May 17, 1990) (statement of Rep. Bartlett).

Amicus believes that its original version of the ADA was a moderate, equitable proposal. Yet Congress saw fit to ameliorate many of the standards *amicus* had proposed and to craft additional defenses and limitations. Far from making ADA standards too severe and thus over-reaching its constitutional authority, *amicus* is convinced that Congress

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[20] For a description of the numerous accommodations that businesses and government facilities routinely provide for employees without disabilities, see Robert L. Burgdorf Jr., *"Substantially limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 529-33 (1997).

moved in the direction of crafting standards that are unnecessarily lenient and limited.

Likewise, *amicus* considers that the protection of the statute based on its definition of "disability," 42 U.S.C. § 12102(2), as construed by this Court in *Sutton v. United Airlines*, 119 S.Ct. 2139 (1999); *Murphy v. United Parcel Service*, 119 S.Ct. 2133 (1999); and *Albertsons, Inc. v. Kirkingburg*, 119 S.Ct. 2162 (1999), and by numerous lower courts is not only not incongruously or disproportionately overextensive, it is in fact overly restrictive. It is defendants, not plaintiffs, who are predominantly successful in ADA litigation. The ADA's requirements and coverage certainly are not incongruous or disproportionate in relation to the serious pattern of State discrimination they address.

CONCLUSION

The ADA is sound legislation, based upon careful congressional consideration and an extraordinarily extensive documentary and informational record. Unlike what may have been the situation in other cases the Court has heard in recent years, in deciding to apply the ADA to the States, Congress did its homework. To invalidate this effort would be to frustrate the considered deliberate judgment of a nearly unanimous Congress, to ignore the strong support of the Executive Branch, and to frustrate the will of the strong majority of American citizens who support the ADA. Appropriate are the words of Representative Dellums, who, on the day that the ADA was passing by an overwhelming margin in the House of Representatives, declared:

> It is at times like these, Mr. Speaker, when I am proud to be a Member of this body. We must remember that we are empowered with a special responsibility by the 14th amendment to the Constitution to ensure that every citizen, not just those of particular ethnic groups, not just those who arguably are "able-bodied," not just those who own

> property -- but every citizen shall enjoy the equal protection of the laws.
>
> Indeed, as the Supreme Court has noted:
>
> > It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees.

136 CONG. REC. H2639 (Daily Ed. May 22, 1990) (statement of Rep. Dellums) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 483 (1980).

For the foregoing reasons, *amicus* respectfully urges the Court to affirm the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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Appendix

Congressionally Commissioned Studies of Discrimination on the Basis of Disability

(1) National Commission on Architectural Barriers

Agency:	National Commission on Architectural Barriers to Rehabilitation of the Handicapped.
Established:	Vocational Rehabilitation Act Amendments of 1965, Pub. L. No. 89-333, 79 Stat. 1282 (1965).
Mission:	To conduct a three-year study of the extent to which architectural barriers prevented access to public buildings and to propose measures to eliminate existing barriers and prevent new ones from being created.
Relevant Report:	*Design for All Americans: Report of the National Commission on Architectural Barriers to Rehabilitation of the Handicapped* (U.S. Department of Health, Education, and Welfare, 1967).
Overall Relevant Results:	Described "unnecessary barriers: a stairway, a too-narrow door, a too-high telephone" as "unnecessary obstacles that prevent millions of people with disabilities from functioning adequately and being productive," and included a series of recommendations for eliminating and avoiding the creation of architectural barriers. *Id.* at 2. Follow-up Senate and House Committee hearings in 1967 and 1968 [21] ultimately produced

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[21] *Hearings on Accessibility of Public Buildings to the Physically Handicapped Before the Subcommittee on Public Buildings and Grounds of the Senate Committee on Public Works*, 90th Cong. (1967); *Hearings on Building Design for the Physically Disabled Before the Subcommittee on Public Buildings on Grounds of the House Committee on Public Works*, 90th Cong. (1968). *See also* S. Rep. No. 90-538 (1968), *reprinted in* 1968 U.S.C.C.A.N., 3214; H.R. Rep. No. 90-1532 (1968); H.R. Conf. Rep. No. 90-1787 (1968).

the Architectural Barriers Act of 1968. Pub. L. No. 90-480, § 1, 82 Stat. 718 (1968), *codified as amended at* 42 U.S.C. §§ 4151-57.

(2) White House Conference

Agency: White House Conference on Handicapped Individuals.

Established: White House Conference on Handicapped Individuals Act, Pub. L. No. 93-516, §§ 300-306, 88 Stat. 1631 (1974).

Mission: To convene a national gathering "to develop recommendations and stimulate a national assessment of problems, and solutions to such problems, facing individuals with [disabilities]," *id.*, § 302, with equal protection as a key focus, *id.*, § 301(4).

Relevant Reports: (a) WHITE HOUSE CONFERENCE ON HANDICAPPED INDIVIDUALS, SUMMARY FINAL REPORT (U.S. Dept. of Health, Education, and Welfare, Office of Human Development, undated [1978]);

(b) WHITE HOUSE CONFERENCE ON HANDICAPPED INDIVIDUALS, VOLUME THREE: IMPLEMENTATION PLAN 61 (1978); and

(c) WHITE HOUSE CONFERENCE ON HANDICAPPED INDIVIDUALS, SPECIAL CONCERNS: STATE WHITE HOUSE CONFERENCE WORKBOOK, 59 (U.S. Dept. of Health, Education, and Welfare, Office of Human Development, undated [1977]).

Overall Relevant Results: Convened national meeting of approximately 3,700 individuals from every state and U.S. territory, representing over 100,000 people who attended local, state, and territorial conferences, in Washington, DC, in May 1977.

Final Report of the Conference to the President and the Congress presented 815 formal recommendations addressing 287 issues.

(3) Commission on Civil Rights

Agency: United States Commission on Civil Rights.

Established: Pub. L. No. 95-444, 92 Stat. 1067 (1978) (added "discrimination on the basis of handicap" to the Commission's areas of jurisdiction).

Mission: To study and collect information concerning legal developments constituting discrimination because of, *inter alia*, "handicap;" serve as a national clearinghouse of information on such discrimination; and submit reports, findings, and recommendations to the President and Congress.

Relevant Reports: (a) ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES (1983); and

(b) U.S. COMMISSION ON CIVIL RIGHTS, CIVIL RIGHTS ISSUES OF HANDICAPPED AMERICANS: PUBLIC POLICY IMPLICATIONS (1980) (record of "consultation" receiving testimony of 30 "selected authorities, advocates, consumers, and practitioners who are acknowledged experts," *id.* at 1).

Overall Relevant Results: Surveyed the types of discrimination people with disabilities encountered and provided both a summary of case law and a conceptual framework for understanding and addressing discrimination on the basis of disability.

(4) National Council on Disability

Agency: National Council on Disability.

Established: Pub. L. No. 98-221, tit. I, § 142, 98 Stat. 27 (1984) (codified as amended at 29 U.S.C. § 781).

Mission: To review federal laws and programs affecting people with disabilities and make recommendations regarding ways to make such laws and programs more effective.

Relevant Reports: (a) TOWARD INDEPENDENCE (1986); and

(b) ON THE THRESHOLD OF INDEPENDENCE (Andrea H. Farbman ed., 1988).

Overall Relevant Results: Described need for and concept of proposed new law to be called the Americans with Disabilities Act; developed and published original version of the ADA introduced in Congress in 1988.

(5) Advisory Commission on Intergovernmental Relations

Agency: Advisory Commission on Intergovernmental Relations.

Established: Pub. L. No. 86-380, 73 Stat. 703 (1959).

Mission: To study the relationship among local, state, and federal governments in the American federal system and to recommend improvements.

Relevant Reports: DISABILITY RIGHTS MANDATES: FEDERAL AND STATE COMPLIANCE WITH EMPLOYMENT PROTECTIONS AND ARCHITECTURAL BARRIER REMOVAL (1989).

Overall Relevant Results: Identified various barriers to governmental compliance with disability rights mandates, and reported results of survey of State officials regarding their assessment of impediments to employment of persons with disabilities in State government.

(6) GAO Accommodations Study

Agency:	General Accounting Office (GAO).
Established:	Request to GAO by members of Congress in January 1990.
Mission:	To provide information about the costs of workplace accommodations and of avoiding or removing architectural, transportation, and communication barriers, to assist in congressional consideration of the ADA.
Relevant Report:	U.S. General Accounting Office, *Persons with Disabilities: Reports on Costs of Accommodations*, A Briefing Report to Congressional Requesters (January 4, 1990).
Overall Relevant Results:	Conducted literature review of published studies going back to 1975, queried wide range of industry groups and disability organizations, and identified twelve reports with relevant information, of which all but one were either conducted by or funded under contract by a federal government agency.

(7) Task Force on Rights and Empowerment

Agency:	Task Force on the Rights and Empowerment of Americans with Disabilities.
Established:	Appointed by the Chairman of the House Subcommittee on Select Education in May 1988.
Mission:	To gather information on the extent and nature of disability discrimination.

Relevant Reports:	(a) Eleven interim reports submitted to Congress and testimony provided at hearings on the ADA in both the House and Senate;[22] and (b) *From ADA to Empowerment; The Report of the Task Force on the Rights and Empowerment of Americans with Disabilities* (1990).
Overall Relevant Results:	Conducted 63 public forums around the country attended by over 7,000 persons with disabilities, their families, advocates and service providers; concluded generally that Americans with disabilities face "massive, society-wide discrimination and paternalism." *Id.* at 18, 19.

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[22] *See.* S. Rep. No. 101-116, at 4, 6, 8-9, 16, 17 (1989); *Americans with Disabilities Act of 1989; Hearings on S. 933 Before the Senate Committee on Labor and Human Resources and the Subcommittee on the Handicapped*, 101st Cong. At 18-20, 252-58 (1989); H.R. Rep. No. 101-485, pt. 2. At 25, 26, 27-28 (1990); *Americans with Disabilities Act of 1988: Hearing on H.R. 4498 Before the Subcommittee on Select Education of the House Committee on Education and Labor*, 100th Cong. At 1038-43, 1328-35 (1988): From ADA to Empowerment: *The Report of the Task Force on Rights and Empowerment of Americans with Disabilities*, at 18 (1990).

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA AND THE ALABAMA DEPARTMENT OF YOUTH SERVICES,
Petitioners,

v.

PATRICIA GARRETT AND MILTON ASH,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* SELF-ADVOCATES BECOMING EMPOWERED, PEOPLE FIRST OF ALABAMA, PEOPLE FIRST OF CONNECTICUT, PEOPLE FIRST OF GEORGIA, MASS. ADVOCATES STANDING STRONG, PEOPLE FIRST OF OHIO, SPEAKING FOR OURSELVES OF PA., PEOPLE FIRST OF TENNESSEE, PEOPLE FIRST OF DANE COUNTY AND WISCONSIN, THE AUTISM NATIONAL COMMITTEE, THE CENTER FOR LAW AND EDUCATION AND TASH, IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI

Amici are grass-roots organizations of Americans with developmental disabilities, their families, friends, and professionals in the disability field.[1] *Amici* Self-Advocates Becoming Empowered and its affiliate "People First" organizations are directed by people with disabilities, many of whom were once segregated in large state institutions. Because of the Americans with Disabilities Act, many now live in integrated community settings. People First claim more than 900 chapters in 46 states, with 20,000 active members. *Amici* the Autism National Committee, the Center for Law and Education and TASH -- Disability Advocacy Worldwide also share a commitment to the principle that public services, supports and special education must allow people with disabilities to be independent and self-sufficient. For *amici,* the Americans with Disabilities Act has been a doorway to freedom, opportunity, and equal protection and citizenship under law.

Amici have participated in numerous cases that have raised substantive claims of constitutional violations, many of which were subsequently decided on statutory grounds. *Amici* are therefore aware of how important Congressional enactments have been to vindicating their constitutional rights. They respectfully submit this brief to share with the Court the history of state-sponsored discrimination they have experienced as well as the importance of national anti-discrimination laws in protecting their constitutional rights.

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[1] The parties have consented to the filing of this brief. No counsel for a party has authored this brief, in whole or in part, and no person other than *amici* and their counsel has made any monetary contribution for its preparation.

SUMMARY OF ARGUMENT

Congress enacted the Americans with Disabilities Act to remedy a century of state-sponsored, invidious, and unconstitutional discrimination against people with disabilities. For a century, every state acted to segregate, isolate, and eliminate people with disabilities from the community. State laws and policies segregated people with disabilities in institutions, barred them from public schools, prohibited them from marrying and mandated their sterilization. This pervasive state action denied and continues to deny people with disabilities equal protection and citizenship by excluding them from "everyday life activities, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." *Olmstead v. L.C.*, 527 U.S. 581, 600 (1999).

The Americans with Disabilities Act is a measured and proportionate national remedy for this historical regime of state-mandated discrimination. The Act upholds and enforces "the principle of equal citizenship ... [that] presumptively forbids the organized society to treat an individual either as a member of an inferior or dependent caste or as a non-participant." Karst, *The Supreme Court, 1976 Term -- Forward: Equal Citizenship under the Fourteenth Amendment*, 91 Harv. L. Rev. 1, 6 (1977).

Amici further submit that this Court should affirm that disability-based classifications are subject to heightened scrutiny review. Such review is justified by the purposeful unequal treatment people with disabilities have faced at the hands of the states, treatment that parallels race, gender and ethnic-based discrimination, and would clarify and fulfill the "searching review" the Court employed in *City of*

Cleburne v. Cleburne Living Center, 473 U.S. 432, 457 (1985), to strike down a discriminatory zoning ordinance.

ARGUMENT

I. TITLE II OF THE AMERICANS WITH DISABILITIES ACT IS A REMEDIAL MEASURE THAT IS CONGRUENT AND PROPORTIONAL TO THE LONG, TRAGIC, AND ONGOING HISTORY OF UNCONSTITUTIONAL, STATE-SPONSORED DISCRIMINATION AGAINST PEOPLE WITH DISABILITIES.

A. For Over a Century, the States Have Unconstitutionally Segregated and Isolated People with Disabilities.

For over one hundred years, every State acted purposefully and deliberately to segregate and isolate people with disabilities from community and family, in violation of the Fourteenth Amendment. This regime of state mandated, unconstitutional discrimination arose from irrational prejudice, fear and stereotype and has been described by five members of the U.S. Supreme Court as "grotesque." *Cleburne*, 473 U.S. at 454, 461. By force of law and official action, the States rendered the guarantee of equal citizenship a dead letter for people with disabilities. When set against this stark background, the Americans with Disabilities Act is a measured and appropriate remedy for these widespread, systematic constitutional transgressions.[2]

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[2] Unlike age-based classifications addressed in *Kimel v. Florida Bd. of Regents*, ___ U.S. ___, 120 S.Ct. 631, 646-47 (2000), which the Court has never found unconstitutional, the Court has repeatedly found that states have violated the constitutional rights of people with disabilities. *Cleburne, supra; Youngberg v. Romeo*, 457 U.S. 307

Beginning in the 1870s, state legislatures enacted numerous laws to remove "imbeciles," "idiots," and "the feeble-minded" from society. These efforts were not benign. State officials branded people with disabilities as "the underlying source of nearly all social problems," including "pauperism, degeneracy and crime," and constructed massive public institutions to segregate people with disabilities from society. U.S. Comm'n on Civil Rights, *Accommodating the Spectrum of Abilities* 19-20 (1983). Such discrimination was not limited to severe disabilities. "To isolate handicapped people, some professionals advocated institutionalization for even minor disabling conditions." *Id.* The breadth of such state-enforced exclusion is astonishing:

> Whether young or old; whether borderline or profoundly retarded; whether physically handicapped or physically sound; whether deaf or blind; whether rural or urban; whether from the local town or from 500 miles away; whether well-behaved or ill-behaved[,][w]e took them all, by the thousands, 5,000 to 6,000 in some institutions.

Id. at 20-21 (*quoting* W. Wolfensberger, *The Origins of Our Institutional Models, in* President's Comm. on Mental Retardation, *Changing Patterns in Residential Servs. for the Mentally Retarded* 143 (1969)).

Every state enacted laws forcing the lifetime institutionalization of people with disabilities.[3] In 1919, Alabama established "The Alabama Home" for "[a]ll persons of whatever age who are deficient or inferior, ...

(1982); *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *cf. Meyer v. Nebraska*, 262 U.S. 390 (1923).

[3] A "Compendium of Purposeful State Action" is attached as Appendix A to this brief and was submitted by *Amici* in *Cleburne*.

idiots, imbeciles, feeble-minded or morons, and ... epileptics ..." 1919 Ala. Acts 738, No. 568, § 2, 7-8. A brochure touting the institution warned of the "feeble-minded":

> They do not work. They are immoral. They commit crimes. They multiply like rabbits, and their children are feeble-minded. This institutional care and training of the feeble-minded (1) Purifies human stock, and (2) reduces taxes.

An Institution for the Feeble-Minded of Alabama (1918), *in* E. Larson, *Sex, Race and Science: Eugenics in the Deep South* 81 (1995).[4]

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[4] In stating that "Alabama has a long history of providing support, rehabilitation and protection for individuals with disabilities," Pet. Br. at 7, Petitioners ignore the conditions imposed on people with disabilities in Alabama's state institutions. In *Wyatt v. Stickney*, 334 F. Supp. 1341 (M.D. Ala. 1971), the district court described such conditions at Alabama's Bryce Hospital:

> [T]he dormitories are barn-like structures with no privacy for the patients. For most patients there is not even a space provided where he can think of as his own. The toilets in restrooms seldom have partitions between them. These are dehumanizing factors which degenerate the patients' self-esteem. Also contributing to the poor psychological environment are the shoddy wearing apparel furnished the patients, the non-therapeutic work assigned to patients (mostly compulsory, uncompensated housekeeping chores), and the degrading and humiliating admissions procedure which creates in the patient an impression of the hospital as a prison or a "crazy house" ... Only fifty cents per patient per day is spent for food ...

Id. at 1343. Alabama's institutions continue to impose unconstitutional conditions on people with disabilities. In 1995, a federal court found that Alabama's Eufaula Adolescent Center, an institution for children with disabilities, was so substandard, dangerous, and lacking in treatment that it "was essentially a penal institution." *Wyatt v. Poundstone*, 892 F. Supp. 1410, 1413 (M.D.Ala. 1995). Additionally, "most of the children did not belong in the Center's restrictive

Such actions were not confined to Alabama, or even the South. The segregation, and outright elimination of people with disabilities was a national phenomenon.[5] In 1887 California became the first state to provide for the segregation "for life" of "imbecile or feeble-minded" people. 1887 Cal. Stats. 69 ch. 57 (1887). Massachusetts State Superintendent Dr. Walter Fernald reported in 1908 that "there is an urgent need for the commitment and permanent detention of the higher grade cases of deficit [that are the] most undesirable and troublesome members of society." *Report of the Trustees of the Mass. Sch. for the Feeble-Minded at Waltham for the Year Ending Nov. 30, 1908* 22-23 (1909).[6]

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environment." *Id; see also Wyatt v. Rogers*, 985 F. Supp. 1356, 1404 (M.D. Ala. 1997)(finding "significant violations of individual liberties remain" in other state institutions).

[5] A 1918 Alabama survey called people with disabilities "her most worthless and hopeless citizens," and Governor Charles Henderson declared to Alabama citizens that the institutions were "to protect you from the evils of vice, crime, disease and pauperism." *Social Problems in Alabama* 8, 10 (1918).

[6] As late as the 1970s, with the full authority and cooperation of the states, America's most prestigious universities and scientists used institutionalized children and adults with disabilities as subjects in harmful experiments. In one infamous example, conducted between 1946 and the early 1950s, Massachusetts' Fernald State School fed radioactive isotopes to children with retardation as part of Massachusetts Institute of Technology studies on the effects of radiation in humans. The institution mixed the isotopes with the children's breakfast oatmeal. In studies in the early 1960s, radioactive iodine was fed to children at Fernald and the Wrentham State School, another Massachusetts institution. *U.S. Dep't of Energy, Report of the Advisory Comm. on Human Radiation Experiments* ch. 7 (1995). The federal researcher overseeing the experiments warned that they could be compared to Nazi experiments on concentration camp prisoners. 2 *Recall 1949 Radiation Tests on Them*, N.Y. Times at A14 (Jan. 14,

Driving the states' efforts to ensure that people with disabilities lived "shunted aside, hidden, and ignored," *Alexander v. Choate*, 469 U.S. 287, 296 (1985), was the rise of the eugenics movement in the late 19th and early 20th centuries. Eugenicists believed that heredity "was of single importance in predicting human performance and it must play a key role in policies and programs for human betterment." S. Selden, *Inheriting Shame: The Story of Racism and Eugenics in America* xiv (1999).

There is no better description of the derivation of state policy from eugenics than Justice Thurgood Marshall's concurring opinion in *Cleburne*. Describing the "lengthy and tragic history that can only be called grotesque," Justice Marshall wrote:

> Fueled by the rising tide of Social Darwinism, the "science" of eugenics, and the extreme xenophobia of those years, leading medical authorities and others began to portray the "feeble-minded" as "a menace to

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1994). In the early 1960s, the Arkansas Children's Colony injected children with retardation as young as 13 with iodine-131 as part of a thyroid study. *Government Used 16,000 in Radiation Tests*, AP (Aug. 18, 1995). Another case involved the hepatitis studies of Dr. Saul Krugman of New York University. From 1956 to 1972, the Willowbrook State School in New York allowed Dr. Krugman's staff to "systematically infect[] newly arrived children with strains of the [hepatitis B] virus." *Advisory Comm. Report* ch. 7.

These experiments had discriminatory effects on their human subjects with disabilities lasting well beyond the study period. In 1978 and 1979, the New York City public schools ordered the exclusion of Willowbrook children from public school due to their exposure to hepatitis. *New York State Ass'n for Retarded Children v. Carey*, 612 F.2d 644, 647 (2d Cir. 1979)(holding that no rational basis existed for excluding such children from public school). The Department of Energy concluded in 1995 that "there are still no federal regulations protecting institutionalized children from unfair treatment in research involving human subjects." *Advisory Comm. Report* ch. 7.

> society and civilization ... responsible in a large degree for many, if not all, of our social problems. A regime of *state-mandated* segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow. Massive custodial institutions were built to warehouse the retarded for life; the aim was to halt reproduction of the retarded and "nearly extinguish their race."

473 U.S. at 461-62 (footnotes omitted)(emphasis added).

Inexorably linked with institutionalization and degraded citizenship is the state-mandated segregation and exclusion of children with disabilities from public schools. *Cf. Plyler v. Doe*, 457 U.S. 202, 222-23 (1982). The "wide-spread practice of relegating handicapped children to ... institutions or warehousing them in special classes," *School Comm. of Burlington v. Mass. Dept. of Educ.*, 471 U.S. 359, 373 (1985), was by force of state law.[7] School superintendents urged that children with disabilities were "ineducable" and would never "fit in" to American society.[8] States relegated these children into isolated "state

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[7] *See e.g.* 1976 Cal. Stat. ch. 1010, 3561 (excluding children whose "physical or mental disability" is "inimical to the welfare of other pupils"); 1963 Colo. Sess. Laws ch. 243, 864 (same); 1888 Conn. Pub. Acts tit. 13 § 489 (committing "indigent imbecile children" to "School for Imbeciles at Lakeville"); Nev. Rev. Laws § 1702 (1912)(authorizing education of "deaf and dumb and the blind" only in California and Utah institutions); 1928 N.Y. Laws § 23-624 ("feebleminded" who are "unable to benefit from instruction, shall not be permitted to attend"); 1919 N.Y. Laws ch. 382 (establishing Rome asylum for "unteachable idiots"); 1903 N.D. Laws § 84-759 ("any ... feeble minded child" must attend "institution at Grafton"); 24 Pa. Stat. Ann. § 13-375 (1971)(excluding "children who are found to be uneducable and untrainable").

[8] In *State ex rel. Beattie v. Board of Educ.*, 169 Wis. 231 (1919), the Wisconsin Supreme Court upheld the exclusion of a child with

schools" that were euphemisms for institutions. Many children would spend their entire lives in such facilities. Children with retardation were excluded categorically, in violation of the Fourteenth Amendment. *See Pennsylvania Ass'n for Retarded Children v. Pennsylvania,* 334 F. Supp.1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972); *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972). By 1975, Congress estimated that "one million of the handicapped children in the United States are excluded entirely from the public school system". Education for All Handicapped Children Act, 20 U.S.C. fmr. § 1400(b)(4).

States acted by law to stop the procreation of people with retardation and other disabilities, with an eye toward their eventual elimination. The Court embraced, endorsed and propelled such invidious attitudes in *Buck v. Bell,* 274 U.S. 200 (1927), when it upheld the involuntary sterilization of Carrie Buck, an institutionalized Virginia woman with retardation:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence ... Three generations of imbeciles are enough.[9]

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cerebral palsy from public school due to his "uncontrollable flow of saliva," his "physical condition and ailment [that] produces a depressing and nauseating effect upon the teachers and school children". *Id.* In *Watson v. City of Cambridge*, 157 Mass. 561 (1893), the Massachusetts Supreme Judicial Court upheld a child's exclusion because he made "uncouth noises" and was "unable to take the ordinary decent physical care of himself." *Id.*

[9] *See also* 1919 Ala. Acts 739 § 13 (authorizing sterilization of Alabama Home "inmates"); S. Gould, *Carrie Buck's Daughter, in*

Id. State laws also prohibited people with disabilities from entering the state[10] and criminalized marriage of "idiots", the "insane", and the "feeble-minded." Many such laws were in effect until recently, and many remain in effect today.[11]

Flamingo's Smile: Reflections in Natural History (1985). A 1934 Kentucky Law Review article proudly states that "[t]he United States was the pioneer in the movement for sterilization, and today is considered the foremost champion and advocate of that cause in the world." *Note, A Sterilization Statute for Kentucky*, 23 Ky. L.J. 168, 169 (1934)). Nazi sterilization laws were "taken almost *in toto* from ... [the] Model [State] Eugenical Sterilization Law." A. Chase, *The Legacy of Malthus* 133-35 (1980).

[10] *See e.g.* 44 Ala. Code §§ 19-20 (1940); Fla. Comp. Gen. Laws § 8003 (1927); Ga. Code Ann. § 23-2005 (1935); Kan. Stats. Ann. § 39-339 (Corrick 1935)("person likely to become [public] charge"); 33 Me. Rev. Stats. § 43; Minn. Stats. §§ 3163, 3173 (Mason's 1927)("insane", "idiotic"); Miss. Code Ann. § 5715 (1930); Nev. Comp. Laws § 5147 (Hillyer 1927); S.D. Code § 50.0106 (1939)("person likely to become public charge"); 15 Vt. Pub. Laws ch. 160, § 3949 (1933)(same); Wyo. Stats. Ann. §§ 29-1206a, 29-1205b (Courtright 1931)("persons likely to become [a] charge for disability").

[11] For example, it is currently a crime in Mississippi to issue a marriage license to anyone who is "insane or an imbecile." Miss. Code Ann. § 93-1-5(f)(2000). *See e.g.* Cal. Civ. Code § 4201 (1994); Conn. Gen. Stat. § 46-2 (1999); D.C. Code Ann. § 30-103(1)(2000); Haw. Rev. Stat. § 580-21 (1976); 89 Ill. Comp. Stat. § 6 (1976); Ind. Code § 31-1-1-2 (1973); Ia. Code Ann. § 595.3 (1976); Kan. Stat. Ann. § 23-120 (1977); Ky. Rev. Stat. Ann. § 402.020(1)(1971); Me. Rev. Stat. Ann. tit. 19, § 32 (1964); Mich. Stat. Ann. § 25.6 (1999); Mo. Rev. Stat. § 451.020 (1983); Neb. Rev. Stat. § 42-103 (1974); N.J. Stat. Ann. § 37:1-9 (1969); N.C. Gen. Stat. § 51-12 (1985)(sterilization required for marriage); N.D. Cent. Code § 14-03-17 (1971); N.Y. Dom. Rel. Law § 140(3)(2000); Ohio Rev. Code Ann. § 3101.06 (1975); 48 Pa. Stat. Ann. § 1-5(d)(1997); R.I. Gen. Laws § 15-1-5 (1970); Tenn. Code Ann. § 36-3-109 (1999); 15 Vt. Stat. Ann. § 512 (2000); V.I. Code Ann. tit. 16, § 2(1)(2000); Va. Code Ann. § 20-46(4)(1985); Wash. Rev. Code Ann. § 26.04.030 (1976); W. Va.

B. The Regime of State-Mandated Discrimination Continues to Deny Equal Citizenship to People with Disabilities.

Petitioners assert that because of changed attitudes, people with disabilities no longer face significant discrimination or barriers to their full involvement in society. The sheer weight of the historical record of discrimination alone betrays the falsity of this argument. While attitudes toward disability, like race and gender, have improved in recent years, the effects of a century of invidious discrimination, propelled by the power of every State, still figure significantly in state policy and actions toward people with disabilities. The state-mandated segregation that caused the near-total lack of access of people with disabilities in society cannot be dismissed as a relic of the past.[12]

The discriminatory infrastructure of separate institutions and schools the states created is still present in America and spawns a vicious circle of exclusion from other facets of life, including work, education, and transportation. As sponsoring Representative Tony Coehlo noted in a joint Congressional hearing on the Act:

> When housing is inaccessible and unavailable, the disabled have to stay at home, under the care of their families, or live in nursing homes and other

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Code Ann. § 48-2-2(a) (2000); Wyo. Stat. Ann. § 20-32 (1959). *See also Notes: The Right of the Mentally Disabled to Marry: A Statutory Evaluation*, 15 J. Fam. L. 463 (1976-77).

[12] *Cf. Allen v. Wright*, 468 U.S. 737, 755 (1984)("There can be no doubt that [stigmatizing injury] is one of the most serious consequences of discriminatory government action.")

> institutions, rather than establishing and controlling their own households next door to you and me. When regular transportation is inaccessible, and transit services for the disabled are segregated, you won't see them on your bus or commuter train. When prejudice dictates that the handicapped can be productively employed only in separate sheltered workshops, you won't see too many of them in your workplace. ... We must stop the cycle of separateness which hides people with disabilities, and creates prejudice, which creates more separateness.

Hearings before the Subcomm. on the Handicapped, Sen. Labor and Human Resources Comm., and the Subcomm. on Select Educ., House Educ. and Labor Comm., 100th Cong., 2nd Sess. 15 (1988).

Justice Marshall wrote in *Cleburne* that "[p]rejudice, once let loose, is not easily cabined." 473 U.S. at 464. He continued, "[M]ost important, lengthy and continuing isolation of the retarded has perpetuated the ignorance, irrational fears, and stereotyping that long have plagued them." *Id.* Last term, the Court heard arguments on whether a state had the right to segregate two women with retardation even when the women could live and were living in the community. The Court held that the unnecessary segregation of people with disabilities "who can handle and benefit from community settings *perpetuates unwarranted assumptions* that persons so isolated are incapable or unworthy of participating in community life." *Olmstead v. L.C.*, 527 U.S. 581, 600 (1999)(emphasis added).[13]

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[13] The statutes the seven state *amici* cite for Petitioners as proof that state-sponsored discrimination never existed or has been eradicated *do not* address, let alone rectify, the legacy of unnecessary segregation and institutionalization that Title II seeks to remedy. Indeed, Alabama continues to "perpetuate unwarranted assumptions" by having the

Yet many of the institutions created to segregate the "feeble-minded" operate today.[14] *See Hunter v. Underwood*, 471 U.S. 222, 232-33 (1985)(official policy, originally motivated by discrimination, continues to have discriminatory effect regardless of current official attitudes). As of 1998, states housed nearly 125,000 Americans with developmental disabilities in such facilities. D. Braddock et al., *The State of the States in Developmental Disabilities: 2000 Study Summary* (2000). These state institutions have been found to segregate unnecessarily thousands of people with disabilities, in violation of the Fourteenth Amendment. *Thomas S. v. Flaherty*, 699 F. Supp. 1178, 1191 (W.D.N.C. 1988), *aff'd*, 902 F.2d 250 (4th Cir.), *cert. denied*, 498 U.S. 951 (1990); *Clark v. Cohen*, 794 F.2d 79, 83 (3rd Cir.), *cert. denied*, 479 U.S. 962 (1986); *Savidge v. Fincannon*, 836 F.2d 898, 906 (5th Cir. 1988); *cf. S.H. v. Edwards*, 886 F.2d 292, 293 (11th Cir. 1989).[15] These institutions have

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second-highest rate of institutionalization in the nation. D. Braddock et al., *The State of the States in Developmental Disabilities* 93 (1998).

[14] The continuing vitality of negative stereotypes toward disability, expressed *inter alia* in the continued operation of segregated institutions, reflects that the "eugenics message of selective breeding and racial betterment [became] an integral part of high school and college biology texts in the 1920s, 1930s, and 1940s" and "were ideas taught to young people in our schools and to the parents at state fairs and in popular magazines." S. Selden, *Inheriting Shame: The Story of Eugenics and Racism in Ameica* xi (1999). "[T]he dead hand of the past continue[s] to guide the practices of the present as well as of the future." *Id.* at vii.

[15] *See Meyer v. Nebraska*, 262 U.S. 390, 401-02 (1923)(the historical practice of "'putting away ... the offspring of the inferior, or of the better when they chance to be deformed'" would "do ... violence to both the letter and spirit of the Constitution.")(*quoting Plato's Ideal Commonwealth*).

also been found to lack treatment or habilitation and are often squalid and dangerous, as Alabama's example starkly shows. See *supra* note 4.[16]

States continue to exclude students with disabilities from regular classes and schools. In 1996-97, over twenty years after the passage of the Education for All Handicapped Children Act, 89.5 percent of American children with retardation are excluded from regular classrooms for over 80 percent of the school day; in Alabama, the figure is 96.31 percent. For children classified as having solely orthopedic impairments — not cognitive disabilities, but physical disabilities — 58.46 percent remain excluded from regular class nationwide; in Alabama one in two were so excluded.[17] U.S. Dep't of Educ., *Twenty-First Annual Report to Congress on the Implementation of the Individuals with Disabilities*

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[16] Alabama is not the only state that continues to impose unconstitutional conditions on institutionalized people with disabilities. *See Jackson v. Fort Stanton Hosp. & Training Sch.*, 757 F. Supp. 1243 (D.N.M. 1990), *rev'd in part on other grounds*, 964 F.2d 980 (10th Cir. 1992); *New York State Ass'n for Retarded Children v. Carey*, 551 F. Supp. 1165, 1170-78 (E.D.N.Y. 1982)(describing filthy, unsanitary and unhealthy conditions, inadequate treatment, and understaffing at multiple New York state institutions); *Lelsz v. Kavanagh*, 673 F. Supp. 828, 860-61 (N.D. Tex. 1987)(inadequate medical care, lack of safety, misuse of restraints, and lack of habilitation services all violated constitutional rights of residents of Texas state institution); *see also* Nancy Vogel, *Retarded, Autistic Home Failed to Prevent Death*, L.A. Times (Jul. 17, 2000)(reporting egregious conditions at California's Sonoma institution, the nation's first and largest).

[17] *See also* J. Landau, *Out of the Mainstream: Education of Disabled Youth in Massachusetts* (1987)(from 1974 to 1985, segregation of students with disabilities increased 243 percent).

Education Act (IDEA)(1999).[18] State-sponsored discrimination additionally remains in employment[19] and zoning.[20] The historical regime of state-mandated discrimination has not been dismantled and remains an ever-present barrier to equal citizenship for Americans with disabilities.[21]

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[18] Such segregation is emphatically not because children with retardation cannot be included in regular classes. In 1996-97, Vermont included 72.71 percent of its students with retardation and 87.1 percent of students with orthopedic disabilities in regular classes. *Id.*

[19] A 1995 study of New York State employees in four agencies, including the Office of Mental Retardation and Developmental Disabilities, found that people with disabilities were systemically excluded from state employment. S. Harlan et al., *Disability in Work Organizations: Barriers to Employment Opportunity*, Univ. at Albany, State Univ. of New York (1995). Significantly, the study found little difference between the public and private sector. "The State is first and foremost a large employer that has much in common with other large businesses in its bureaucratic organization of the work force." *Id.* at 156.

[20] State laws and official conduct that the *Cleburne* Court found unconstitutional persist today and require judicial remedies. *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1500 (10th Cir. 1995)(reviewing Utah state law which "facially single[s] out the handicapped and appl[ies] different rules to them"); *Marbrunak v. City of Stow*, 974 F.3d 43, 47-8 (6th Cir. 1992)(striking differential safety requirements for home for retarded); *Arc of New Jersey v. New Jersey*, 950 F. Supp. 637, 645 (D.N.J. 1996)(striking down state law setting "permanent quotas on the number of developmentally disabled or mentally ill individuals who may live" in a community).

[21] The irrationality of these state actions is exemplified by the extensive empirical literature showing the competency of people with disabilities. *See e.g.* J. Conroy et al., *The Pennhurst Longitudinal Study* (1985)(success of formerly institutionalized people with disabilities in community); Baller et al., *Mid-Life Attainment of the Mentally Retarded: A Longitudinal Study*, 75 Genetic Psychol. Monographs 235, 255-65, 310 (1967)(marriage, voting); Gutshall et

C. Through the Act, Congress Sought to Remedy and Deter Equal Protection Violations and Enforce the Guarantee of Equal Citizenship.

When Congress enacted the Americans with Disabilities Act, it clearly and unambiguously sought to reverse the century of irrational, unconstitutional discrimination established and enforced by authority of every state. A bipartisan Congressional majority recognized the legacy of irrational prejudice and fear that has forced Americans with disabilities to live under discriminatory conditions,[22] and set forth to make the guarantees of the Equal Protection and Equal Citizenship Clauses a reality for people with disabilities.

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al., *An Exploratory Study of the Interrelations Among Driving Ability, Driving Exposure and Socio-economic Status of Low, Average, and High Intelligence Males*, 35 Exceptional Children 43-7 (1968)(driving).

[22] *See* S. Rep. No. 116, 101st Cong., 1st Sess. 8 (1989)("Our society is still infected by the ancient, now almost subconscious assumption that people with disabilities are less than fully human and therefore are not fully eligible for the opportunities, services, and support systems which are available to other people as a matter of right."); *see e.g.* 136 Cong. Rec. H2449 (May 17, 1990)(statement of Rep. AuCoin)(persons with disabilities subjected to "myths, stereotypes and irrational fears"); 135 Cong. Rec. S4986 (May 9, 1989)(statement of Sen. Harkin)(people with disabilities subjected to "false presumptions, generalizations, misperceptions, patronizing attitudes, ignorance, irrational fears, and pernicious mythologies"); *Hearings on H.R.. 2273 and S. 933 Before the Subcomm. on Transportation and Hazardous Materials of the Comm. on Energy and Commerce*, 101st Cong., 1st Sess. 1 (1989)(statement of Rep. Luken)("Discrimination, whether produced by overt actions or thoughtless attitudes, produces segregation, exclusion, impoverishment, and denial of equal and meaningful opportunities.").

The movement to enact a civil rights statute for people with disabilities began in 1982 with President Reagan's call to free people with disabilities from official discrimination and exclusion:

> Our Nation's commitment to *equal protection of the laws* will have little meaning if we deny such protection to those who have not been blessed with the same physical or mental gifts we too often take for granted. I support Federal laws prohibiting discrimination against the handicapped, and remain determined that such laws be vigorously enforced.

National Council on the Handicapped, *On the Threshold of Independence* 19 (1988)(emphasis added). Responding to the President's declaration, the United States Civil Rights Commission in 1983 issued *Accommodating the Spectrum of Individual Abilities*. The report, which Congress adopted into the record of the Disabilities Act, documented the equal protection violations people with disabilities suffered, including the state-sponsored discrimination arising from the "eugenics" movement.[23] Following the Commission's

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[23] The Civil Rights Commission found:

> The harshest side of institutionalization is the systematic placement of handicapped people in substandard residential facilities, where incidents of abuse by staff and other residents, dangerous physical conditions, gross understaffing, overuse of medication to control residents, medical experimentation, inadequate and unsanitary food, sexual abuses, use of solitary confinement and physical restraints, and other serious deficiencies and questionable practices have been reported. But even the better institutions suffer the ill effects of segregation:
>
> > Institutions serve two central purposes. First, they segregate disabled people from the community; and second, they provide convenience for administrators and instructional personnel because children with a given disability are concentrated together and readily accessible. As instruments of segregation, institutions are undeniably effective . ... As settings for individual growth and

report, the National Council on the Handicapped in 1986 issued *Toward Independence,* which found that "[b]illions of *public dollars* are currently spent on maintaining millions of disabled Americans in situations of unproductive dependency, which impose artificial limits on disabled individuals' potential to become contributing members of society." *Toward Independence* at G-1 (emphasis added). The report recommended a comprehensive civil rights statute for people with disabilities.

Toward Independence and its 1988 successor, *On the Threshold of Independence,* also became a part of the Congressional record and served as the forerunner to the Act itself. Lowell P. Weicker, Jr., *Historical Background of the Americans with Disabilities Act*, 64 Temple L. Rev. 387, 391 (1991).[24] Building on these three comprehensive reports, Congress developed over two years hearings and testimony documenting the history of equal protection violations against people with disabilities. Former sponsor Senator Weicker described the state-mandated discrimination that the Act was designed to remedy:

> For years, this country has maintained a *public policy* of protectionism toward people with disabilities. We have created monoliths of isolated care in institutions and in segregated educational settings. It is that

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> development, however, institutions may be the worst possible arrangement.

Accommodating the Spectrum of Abilities 33 (*quoting* F. Bowe, *Handicapping America: Barriers to Disabled People* 143-44 (1978)).

[24] President Reagan responded, "I agree with the goals in *Toward Independence -- equal opportunity and full social participation* for all Americans". He added, "The road toward full independence will not be easy." Letter from President Ronald Reagan to the Hon. Sandra S. Perrino, Chairperson, National Council on the Handicapped (Jan. 29, 1986), *in On the Threshold of Independence* 5 (emphasis added).

> isolation and segregation that has become the basis of the discrimination faced by many disabled people today. Separate is not equal. It was not for black; it is not for disabled.

Hearings on S. 933 Before the Comm. on Labor and Human Resources and the Subcomm. on the Handicapped, 101st Cong., 1st Sess. 215 (1989)(emphasis added). James Ellis, the President of the American Association on Mental Retardation, testified similarly:

> People with disabilities have been subjected to invidious discrimination throughout history. In the case of individuals who have mental retardation, the history of discrimination has been described by five members of the Supreme Court of the United States as "grotesque." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 454, 461 (1985). This discrimination has been pervasive and has reached almost every aspect of the lives of people with disabilities and has denied them the most basic and fundamental rights of American citizenship.

Hearings on H.R. 2273 Before the Subcomm. on Civil and Constitutional Rights of the Judiciary Comm., 101st Cong., 1st Sess. 418 (1989).[25] Congress intended Title II as a

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[25] *See e.g. Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988, Hearings Before the Subcomm. on Select Educ., House Educ. and Labor Comm.*, 100th Cong., 2nd Sess. (1988) at 10 (testimony of Justin Dart)("America cannot afford either the moral or economic costs of maintaining ever increasing millions of its potentially productive citizens in unjust and unwanted dependency."), 31 (testimony of Eric Griffen)("[F]orced segregation and dependency of millions of individuals with disabilities in this country constitutes a violation of their constitutional and basic human rights"), 62 (statement of Bill Knight)("[A] segregated society is created due to institutionalization."); *Hearing on H.R. 2273 Before the House Subcomm. on Select Educ. of the Educ. and Labor Comm.*, 101st Cong., 1st Sess. (1989) at 10 (testimony of Joseph Reum)("We have

remedial measure that would guarantee equal access to public services and that such services not act as the catalyst for unconstitutional segregation.

D. The Act is Proportional and Congruent to the History of Unconstitutional, State-Sponsored Discrimination Against People with Disabilities.

To determine whether a statute is a valid enforcement measure, courts must "first identify the Fourteenth Amendment 'evil' or 'wrong' that Congress intended to remedy, guided by the principle that the propriety of any §5 legislation 'must be judged with reference to the historical experience ... it reflects.'" *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 639-40 (1999)(*quoting City of Boerne v. Flores*, 521 U.S. 507, 525 (1997)).

In *Cleburne*, the Court scrutinized the six proffered grounds for the zoning ordinance and rejected all because they furthered no governmental interest. Three of the six grounds were based on "vague, undifferentiated fears" (neighbors' negative attitudes; the fears of elderly residents; the possibility of harassment); two on irrational assumptions about the risks the home's location posed to the residents or others; the last on an irrational assumption that the home's size would constitute a burden. While recognizing that the retarded "suffer a disability not shared by others", the constitutional question was "why this difference warrants a ... regulation that others need not observe". 473 U.S. at

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experienced a segregation which shuts away the humanity ... We have been institutionalized, we have been sheltered, we have had our choices limited ... This legislation sets many people free who challenge the best of our society to respect the dignity and integrity of the individual.").

449-50. The Court concluded "that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded," and accordingly struck down the ordinance. *Id.* at 450.

This Court has similarly concluded that this conduct is exactly what the Act and its antecedent statute, Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, address. In the first case reviewing Section 504, the Court held the statute prohibits an employer from "exclud[ing] from participation in a federally funded program 'solely by reason of his handicap,' indicating only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context." *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979). Subsequently, this Court held the statute is "*carefully structured* to replace such reflexive reactions to actual and perceived handicaps with actions based upon reasoned and . . .sound judgments." *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 284 (1985)(emphasis added). "[D]iscrimination on the basis of mythology [is] precisely the type of injury Congress sought to prevent." *Id.* at 285.

In *Olmstead*, this Court held the Act prohibits state conduct such as unnecessary institutionalization, that is based on or "perpetuates *unwarranted assumptions* that persons [with disabilities]. . .are incapable or unworthy of participating in community life" or that "severely diminish the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." *Olmstead*, 527 U.S. at 600-01. Thus, if including a person with a disability in the community is reasonable and does not fundamentally alter the state's disability services program, the state's exclusion of the person from the community is irrational and would withstand

neither the Act nor the Fourteenth Amendment. *See Olmstead*, 527 U.S. at 602.[26]

The Act is proportional because it imposes no duty except with regard to *qualified* persons with disability. Under *Title I*, undue burden and fundamental alternation modify the duty; under the public services provisions of *Title II*, only fundamental alteration obtains. H.R. Rep. 101-485(III), 101st Cong., 2nd Sess. 50 (1990). Just as Justice White did in *Cleburne*, the only way to be sure whether state action is prohibited under the Act is thoughtfully to consider whether the reasons given are factually correct and not based on myth, stereotype or ignorance. In short, the question required by the Act is whether upon analysis, the reasons dissolve to prejudice. *See Bragdon v. Abbott*, 524 U.S. 624, 650 (1998)(decisions covered by the Act must be based on "objective evidence"); *see also Olmstead*, 527 U.S. at 602.

Considering the Act's coverage and defenses, the constitutional violations that Title II prohibits are proportional if not identical to those forbidden unanimously by the Court in *Cleburne*. Petitioners dismiss *Cleburne* on "level of scrutiny" grounds while deliberately avoiding the *content* of the Court's opinion. Under *Cleburne*, it is not true that "any excuse" will suffice; rather, conduct "whose relationship to an asserted goal is so attenuated ... render[s] the distinction arbitrary or irrational." 473 U.S. at 446 (citations omitted). The Act is no different: it prohibits conduct that differentiates on the basis of, or discriminates against, disability when, after careful consideration of the

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[26] The Court has recognized that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" *City of Boerne*, 521 U.S. at 518 (*quoting Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)).

Act's defenses, no rational justification for the conduct exists.

II. THE COURT SHOULD AFFIRM THAT DISABILITY-BASED CLASSIFICATIONS ARE SUBJECT TO HEIGHTENED SCRUTINY.

Amici submit that the Court should acknowledge and affirm the heightened scrutiny review for disability-based classifications that the Court actually applied in *Cleburne*, with five Justices saying so and all nine doing so. Certainly, this Court has never applied the "minimal scrutiny" Petitioners seek here. Moreover, if Petitioners' arguments are accepted, the Court's analysis in *Cleburne* would be invalid and stood on its head.

A. A Holding that the Act is Unenforceable Against States Would Render Invalid the *Cleburne* Court's Analysis and its Protections for People with Disabilities.

In unanimously striking down the Texas ordinance, the *Cleburne* Court acknowledged the long and invidious state-sponsored discrimination against people with disabilities, calling it "grotesque." 473 U.S. at 454, 461. As stated above, the Court conducted a "searching review" of each of the six reasons offered to justify the exclusionary statute and rejected each as bearing no relation to a legitimate governmental concern. *Id.* at 457. In so doing, the Court applied a test which Justice White called "rational basis" but which is in fact identical to heightened scrutiny review. Indeed, five Justices so found. Justice Marshall, joined by Justices Brennan and Blackmun, explicitly found the Court used "precisely that sort of probing inquiry associated with heightened scrutiny." *Id.* at 458.

Justice Stevens rejected Justice White's categorization of the *Cleburne* test as "minimal" and explicitly eschewed categories of scrutiny. Instead of the talismanic application of rigid levels of review, Justice Stevens recognized that "classifications based on ... mental retardation[] do not fit well into sharply defined classifications," *id.* at 451, and applied a simple syllogism. When the "class ... harmed by the legislation" has been "subjected to a 'tradition of disfavor' by our laws", *Id.* at 453, the Court must carefully scrutinize the proffered justification for the state action. Justice Stevens found that his standards apply to disability because persons with retarded "'have been subject to a history of unfair and often grotesque mistreatment.'" *Id.* at 454 (citation omitted). Thus, although not using the words "heightened scrutiny," Justice Stevens and Chief Justice Burger, as well as three other Justices, rejected "minimal scrutiny" and required a review identical to heightened scrutiny for the *Cleburne* zoning ordinance.

Cleburne held that disability-based classifications fall when based on "mere negative attitudes or fear" or "[p]rivate biases," 473 U.S. at 448, exactly like gender-based classifications, which the Court has long held "must be applied free of fixed notions concerning the roles and abilities of males and females." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). Under heightened scrutiny, a statutory classification fails if it "reflects archaic and stereotypic notions." *Id.* Yet if, as Petitioners urge, the congruence of these tests is ignored, "rational basis" threatens to do what the *Cleburne* Court warned should not happen: it would leave people with disabilities "unprotected from invidious discrimination." 473 U.S. at 446.[27] *Amici* submit that the semantic game of

[27] In finding that Justice White refused to name a higher level of scrutiny but applied one in practice, Justice Marshall warned that the

words should be ended: The Court must affirm that people with disabilities are a quasi-suspect class and that disability-based classifications must be reviewed with heightened scrutiny.

In recommending what he called "rational basis" review, Justice White relied significantly on existing anti-discrimination laws. He reasoned that such laws meant that persons with disabilities are not "politically powerless in the sense that they have no ability to attract the attention of the lawmakers" and exemplified a lack of "continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary." *Id.* at 445-46. The Disabilities Act would presumably rank among the laws evincing a changed attitude toward disability as well as the influence of disability organizations. Thus the inherent paradox presented here: a lower level of scrutiny threatens to render unenforceable the very laws that justified lowering the level of scrutiny.

Ignoring the analysis of all three opinions, and ignoring that nine justices were unanimous in what the Court actually did, Petitioners wield "rational basis" as a sword with which they urge this Court to cut down the laws and protections whose existence Justice White used as the very grounds for finding only a limited review necessary. People with disabilities therefore would be deprived of the heightened constitutional protection of their rights because they were able to obtain the statutory protection which this

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"searching inquiry" of the *Cleburne* majority would be ignored by future litigants and courts. "[T]he Court provides no principled foundation for determining when more searching inquiry is to be invoked." 473 U.S. at 460. Fifteen years later, Justice Marshall's fears have been realized as Petitioners use *Cleburne* to argue for near-total deference to states in setting classifications affecting people with disabilities.

Court is now being asked to find unenforceable.[28] Conversely, people with disabilities would be deprived of the statutory protections Congress found necessary to prevent state-sponsored constitutional deprivations because they had the power to obtain that protection from Congress. This is a classic Catch-22. The authors of *Cleburne* could neither have intended nor foreseen such perverse irony. Had Justice Stevens known that his refusal to apply the rigid three-tier construct would be used to cut down one of the most important civil rights laws for people with disabilities, *Amici* submit that he would have agreed to label his review as "heightened scrutiny," given his rejection of irrational, prejudicial state conduct.

B. The Court Has Not Set "Minimal Scrutiny" as the Level of Scrutiny for Disability-Based Classifications.

Petitioners also misstate the Supreme Court's previous constitutional holdings on disability-based classifications. The cases Petitioners cite did not reach the question of, much less decide, the level of scrutiny to apply.

In *Schweiker v. Wilson,* 450 U.S. 221 (1981), the Court did not reach the question of what level of scrutiny to apply because, it explicitly held, the challenged statute was not a disability-based classification. The Court ruled it had "no occasion to reach this issue [level of scrutiny] because

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[28] Also ironic is Justice White's finding that "rational basis" review would facilitate remedial legislation for people with disabilities. 473 U.S. at 444 ("[M]erely requiring the legislature to justify its efforts ... may lead it to refrain from acting at all.") Yet Petitioners here use this analysis to argue for the unenforceability of perhaps the most prominent remedial measure any legislature has enacted for people with disabilities.

we conclude that this statute does not classify directly on the basis of mental health." *Id.* at 231.

As to *Heller v. Doe*, 509 U.S. 312 (1993), the Court again explicitly declined to determine the level of scrutiny applicable to disability-based classifications. In *Heller*, the Court held that the respondents were estopped from arguing for heightened scrutiny because they had failed to do so below. *Id.* at 318-19; *see also id.* at 334 (O'Connor, J.)(finding state's classification irrational and agreeing that "I would not reach the question whether heightened equal protection scrutiny should be applied").

And in *Cleburne*, Justice White's statement is in any event classic *dicta* because the question of level of scrutiny is unnecessary to the Court's ultimate holding. The Court held unanimously that the Texas ordinance could not withstand *any* constitutional standard of review, including rational basis. 473 U.S. at 448-49. Justice White's statement is also on behalf of only four Justices. Thus, Justice White's articulated choice of level of scrutiny is not binding as precedent. *Metropolitan Stevedore v. Rambo*, 515 U.S. 291, 300 (1995)(Kennedy, J.)("Breath spent repeating dicta does not infuse it with life"); *McLaren v. Fleischer*, 256 U.S. 477, 482 (1921).

C. The History of Invidious Discrimination Against People with Disabilities Justifies Heightened Scrutiny.

Moreover, the states' history of purposeful unequal treatment, *see San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973), against people with disabilities justifies the Court's "searching analysis" of disability-based classifications. State-sponsored discrimination against people with disabilities strongly parallels discrimination on the basis of race, national origin, and gender. In *Cleburne*,

Justice Marshall recognized that state-sponsored discrimination against the disabled "in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow." *Id.* at 461. Indeed, states often excluded people with disabilities from public services and programs to the same extent as racial and ethnic minorities and women, sometimes more so. *Cf. Plyler v. Doe,* 457 U.S. 202 (1982)(school exclusion). Just as the United States restricted certain ethnic minorities from immigrating, *see Chinese Exclusion Cases,* 130 U.S. 581 (1889), similar restrictions applied to people with disabilities. *United States ex rel. Fink v. Todd*, 1 F.2d 246, 249 (2d Cir. 1924)(barring Polish immigrant who was deaf and "feebleminded"), *rev'd on other grounds,* 267 U.S. 571 (1925). Likewise, states barred or criminalized the migration of people who were "lunatics," "infirm," "maimed, "deaf," or "dumb." *See supra* note 11 (listing state statutes); *cf. Edwards v. California,* 314 U.S. 160 (1941).

During the early twentieth century, "a time when xenophobia had become almost a national disease," states repeatedly linked disability to any ethnic group considered "inferior." K. Stampp, *The Tragic Legend of Reconstruction, in Era of Reconstruction* 19 (1965). Henry H. Goddard, a leading proponent of state policies to segregate or eliminate the disabled, tested the I.Q. of immigrants at Ellis Island in 1917 and found that 79 percent of Italians, 80 percent of Hungarians, 83 percent of Jews, and 87 percent of Russians were "feeble-minded." H. Goddard, *Mental Testing and the Immigrants,* 2 J. Delinquency 243, 249, 252 (1917). Superintendents of state institutions urged the U.S. Congress to bar certain nationalities from entry due to their "propensity for defectiveness." J. Trent, *Inventing the Feeble Mind* 168-69 (1994).

Policies asserting the "inferiority" of people with disabilities also mimicked discriminatory laws, policies and attitudes against African-Americans. Publications such as *The Menace of the Feebleminded in Connecticut* (1915) differed little from such Jim Crow texts as *The Negro: A Menace to American Civilization* (1907). "Southern treatment of feeble-minded individuals closely mirrored white attitudes toward blacks in the early years of the twentieth century." S. Noll, *Feeble-Minded in Our Midst* 90 (1995). Many leading eugenicists were avowed white supremacists. Charles Davenport, who authored *Heredity in Relation to Eugenics* (1911) and *State Laws Limiting Marriage Selection in Light of Eugenics* (1913), argued for marriage restrictions on and sterilization for both the "mentally deficient" and African-Americans. As with people with disabilities, Davenport prescribed that African-Americans "shall not be given a license to marry a white person without a certificate from the State Eugenics Board." *Inheriting Shame* at 49-53; *cf. Loving v. Virginia*, 388 U.S. 1, 12 (1967).

The state-mandated segregation and exclusion of people with disabilities followed the Court's ruling in *Plessy v. Ferguson*, 163 U.S. 537, 544-52 (1896).[29] *Plessy* held that the Fourteenth Amendment was no barrier to segregation, and its example legitimized the states' segregation of people with disabilities in institutions and schools. *See* S. Gould, *The Mismeasure of Man* 231 (1995)(1922 U.S. Army finding that 89 percent of African-

[29] The call to segregate disabled Americans also parallels the internment of Japanese-Americans during World War II. *Cf. Korematsu v. United States*, 323 U.S. 214 (1944).

Americans tested as "morons" used to justify racial segregation in schools).[30]

CONCLUSION

For the foregoing reasons, *Amici* respectfully urge the Court to affirm the decision below and that disability-based classifications are subject to heightened scrutiny review.

Respectfully submitted,

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[30] The parallel between racial segregation and exclusion of children with disabilities was explicit in the final defense of racially-segregated schools. In his oral argument to the Court in *Brown v. Board of Educ.*, 347 U.S. 483 (1952), John W. Davis, who argued the case for South Carolina, opened his argument with the following warning:

> May it please the Court, I think if the appellants' construction of the Fourteenth Amendment should prevail here ... I am unable to see why a state would have any further right to segregate ... on the ground of mental capacity.

L. Freedman et. al, *Argument* 51 (1989)(*quoting* Oral Arg. in *Brown v. Bd. of Educ.*).

APPENDICES

APPENDIX A

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

APPENDIX A

COMPENDIUM OF PURPOSEFUL STATE ACTION FOR THE SEGREGATION AND EXCLUSION OF RETARDED PERSONS IN THE FIFTY STATES AND THE DISTRICT OF COLUMBIA

This Appendix presents the official actions of the states promoting and requiring by statute the segregation of retarded people.* Amici have included a sampling of state reports of agencies, officials, committees and boards that constitute the legislative history and the post-enactment history of the laws that were adopted.** All italics have been added by amici.

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*In addition to the 50 states, the federal law enacted by the United States Congress to segregate retarded people found in the District of Columbia is set out at A-76-81.

**For a sampling of state actions affecting retarded people in other areas, *e.g.*, restrictions on marriage, voting, and education, see Appendix B to the Amici Brief of the American Association of Mental Deficiency, *et al.*

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Connecticut. The first recorded provision of a specialized facility for retarded people in this country occurred in Connecticut when the American Asylum for the Deaf and Dumb, located in Hartford, in 1818 counted among its students a few "idiot children." REPORT OF THE COMMISSIONERS ON IDIOCY TO THE GENERAL ASSEMBLY OF CONNECTICUT 62 (1856). Later, the Connecticut legislature provided some funding for a private school in Lakeville. After the turn of the century, though, that facility began receiving a sharply increased number of residents, and it soon became a custodial institution. In 1906 the Director was already reporting that "removals are almost unknown." REPORT OF THE DIRECTORS AND SUPERINTENDENT OF THE CONNECTICUT SCHOOL FOR IMBECILES 6 (1906).

By 1908 the operators of the facility claimed they had "a wide knowledge of the imperative need of providing *permanent* custodial care for the safeguarding of girls and women of feeble mind, and a growing appreciation of the preventive value of equal custodial care for the male of evil tendencies. Backed by effective legislation the care of the defective has resolved itself into a comparatively simply matter. . . ." REPORT OF THE DIRECTORS AND SUPERINTENDENT OF THE CONNECTICUT SCHOOL FOR IMBECILES 12 (1908). "[T]he surest, most humane and most economical solution of the problem of prevention lies in providing custodial care for the feeble minded of every condition and *for a lifetime*." *Id.* at 13.

In 1911, the General Assembly enacted a statute providing that "imbecile[s]" could be admitted to the Lakeville facility by application of the "selectmen" of any town. 1911 Conn. Pub. Acts 1493, ch. 211. In 1913 the state formally took control of the institution by enactment of a statute specifying that its "object" would henceforth be the "custody" of any "imbeciles resident of this state." 1913 Conn. Pub. Acts 1765, ch. 160, §1.

The following year, state officials reported that they were "of the opinion that the problem of the feeble-minded in the State of Connecticut urgently demands a much more adequate provision for these unfortunate individuals than is now supplied. It has been estimated that *there must be at least three thousand feeble-minded in the State, and at the present time, provision is made for only three hundred.* It is a now recognized fact that feeble-mindedness is to a much greater extent than insanity an inheritable condition and it is known that this class is particularly prolific. The criminal, the alcoholic, and the prostitute are all recruited from the ranks of the feeble-minded. The only practicable way to restrict the growth of the feeble-mindedness in the state is to *segregate* the feeble minded and particularly feeble-minded women during the child bearing-period. The question to be decided is really this: Shall we of this generation accept the burden of this care, or shall we hand on to the next generation a much larger share? Undoubtedly failure to *now segregate* the feeble-minded will result in an increasing prevalence of the condition as time goes on." STATE OF CONNECTICUT, BIENNIAL REPORT OF CONNECTICUT SCHOOL FOR IMBECILES, LAKEVILLE, CONN., FOR TWO YEARS ENDED SEPTEMBER 30, 1913-14, at 8 (Pub. Doc. No. 15, 1915). The report also recommended that the "institution should not be situated in the midst of a populous village. While it should be convenient to railroad communication, it should be somewhat *remote from the centers of population for reasons that are obvious.*" *Id.* at 7.

In order to gain public support for the new facility, Superintendent Charles T. LaMoure and the Board of Trustees of the School for Imbeciles published and distributed widely a pamphlet in which they claimed an urgent need to "[s]top the supply of the vicious, the weak, the no-willed people who cannot support themselves in the community — of the criminals and prostitutes and paupers, by cutting off the supply at its source, namely

— by providing adequate *custodial care for the feeble-minded of the State*." THE CONN. SCHOOL FOR IMBECILES, THE MENACE OF THE FEEBLE-MINDED IN CONNECTICUT 9 (1915). These "feeble-minded" people, "though really children, are *allowed to go about through the community as though they were adults*. They have an impaired sense of right and wrong, weak will power and no power of realizing the future. . . .

"Moreover, the feeble-minded are unusually prolific. Therefore the longer the State of Connecticut delays in making adequate provision for the feeble-minded, the greater the burden of feeble-mindedness she will have to bear in future *[sic]*." *Id.* at 3. But they proposed a solution: "The State has the opportunity of buying for this institution a large tract of forest and arable land — between six and seven hundred acres. . . . This property is in the central part of the State, *remote from centres of population* . . . and there is room for the institution to grow indefinitely." *Id.* at 13. For this purpose, "[t]he trustees of the Connecticut School for Imbeciles are asking the General Assembly for authority to sell the present plant, and to use the proceeds and $200,000 to be appropriated by the State in the purchase of this property, and in equipping it for the needs of the institution. This would provide, aside from the necessary alterations to buildings, etc., sufficient cattle and farming implements, so that the institution could produce its own milk and vegetables, *using for the most part the labor of its high grade patients*." *Id.* at 14.

On February 25, 1915, a hearing was held before the state legislature's Committee on Humane Institutions. One witness testified that "hardly a week goes by but what we have a case of a feeble-minded girl or boy called to our attention. We have no way of *getting rid of* these kinds of cases." *Connecticut School for Imbeciles: Hearings on H. B. No. 644 Before the Joint Standing Committee on Humane Institutions* 20 (typed transcript, Feb. 25, 1915) (statement of Mr. Kerner of Waterbury). An-

other thought it necessary for "every feeble-minded child in the school [to be] eliminated or placed in a special class." *Id.* (statement of Miss Wright of Stanford). Superintendent Alexander Johnson of New Jersey's institution at Vineland brought to the Committee's attention "this book called, 'The Menace of the Feeble-Minded in Connecticut,' which was gotten up by the Board of Trustees for the School of Imbeciles, and I would recommend anyone who has any doubt as to the proper care of that class to read this book very carefully." *Id.* at 2 (statement of Dr. Johnson).

On May 20, 1915, the Connecticut legislature followed the recommendations of the state officials and the witnesses at the hearing and appropriated the $200,000 requested for an ambitious construction project on state-owned land at Mansfield Depot, an isolated railway stop sixty miles northeast of Hartford.

By the time he wrote his 1916 Biennial Report, Superintendent LaMoure thought that "[t]he dangers associated with allowing *the feeble-minded to remain at large* among the general population have been so frequently discussed that it is not necessary to do more than refer to them." STATE OF CONNECTICUT, BIENNIAL REPORT OF THE CONNECTICUT TRAINING SCHOOL FOR FEEBLE-MINDED, LAKEVILLE, CONN., FOR THE TWO YEARS ENDED SEPTEMBER 30, 1915-16, at 7 (Pub. Doc. No. 15, 1917). He looked forward to the completion of the new institution, where, he noted, "[m]any of the male *inmates* . . . are capable of doing *a considerable amount of satisfactory farm work* under supervision, and, with a proper farm we should be in a position to improve the quality of our food and save the State a considerable amount of money by raising vegetables, producing our own milk and eggs, and using rather than wasting our garbage by the keeping of pigs." *Id.*

Delaware. On March 21, 1917, the Delaware General Assembly established the state's first home for "the feeble-minded." 1917 Del. Laws 597, ch. 172. The in-

stitutionalization of such persons could be sought by "any reputable citizen of the State," which was to be ordered by the county judge "when by reason of such mental condition, *or of existing social conditions*, it would *be detrimental to any community of this State to allow such person to remain at large*." *Id.* §9.

The legislature also adopted "AN ACT to provide for the sterilization of certain mental defectives," 1923 Del. Laws, ch. 62, authorizing the surgery for those at the state home for whom a "physician, alienist and superintendent unanimously determine that procreation *is unadvisable*." *Id.*

Maine. In 1907, the Legislature of Maine established the "Maine School for Feeble Minded." 1907 Me. Acts 42, ch. 44. A special committee chaired by Governor William T. Cobb "[a]fter careful consideration," located the institution "on an area of farmland. . . . The plan called for a large tract of land, which should be removed from any large town. . . ." Hood, *Pineland Observer*, in PINELANDS, 60 YEARS: 1908-1968 (L. Moore, ed. 1968).

In 1921, the lawmakers extended those eligible for commitment to "idiotic and feeble-minded males, between the ages of six years and forty years, and females, between the ages of six years and forty-five years." 1921 Me. Acts 65, ch. 60. Four years later, the legislature authorized sterilization for all those for whom that surgery "may be indicated for the prevention of the reproduction of further feeble-mindedness." 1925 Me. Acts 198, ch. 208.

Maryland. On March 31, 1888, the General Assembly of Maryland passed "AN ACT to establish an asylum and training school for the feeble minded of the State of Maryland." 1888 Md. Laws 268, ch. 183. In 1906, the lawmakers mandated that the institution "receive, care for and educate, free of charge, all idiotic, imbecile and feeble-minded persons in this state" approved by the board of visitors of the facility. 1906 Md. Laws 653, ch. 362. The law required that "all such persons shall re-

main in the care, *custody and control* of the visitors of said institution, and the visitors of said institution are hereby authorized to *retain all such persons* in their care, *custody and control* at said institution, until such time as in the judgment of said visitors, or a majority of them, the welfare of such persons *and the public interest* shall justify or call for their release. . . ." *Id.* at 653-54.

The Board of Visitors campaigned vigorously for increased admissions. These reports revealed the institution's segregating purposes: "One of the sad features which hangs as a black cloud over the work, is the fact that some hundreds of children, many of whom are *a burden to the family and a menace to the community in which they live*, are continuously knocking at our doors for admission, but only a small number of these can be received solely for want of funds to maintain them, though we have empty beds awaiting their reception." TWENTY-FOURTH REPORT OF THE BOARD OF VISITORS OF THE ROSEWOOD STATE TRAINING SCHOOL, OWINGS MILLS, BALTIMORE COUNTY 5 (1936).

Massachusetts. As a result of a legislatively commissioned report authored by Dr. Samuel Gridley Howe of the Harvard Medical School, S. G. HOWE, FIRST COMPLETE REPORT MADE TO THE LEGISLATURE OF MASSACHUSETTS UPON IDIOCY 16, 30-55 (Mass. Sen. Doc. No. 51, 1848), the Massachusetts legislature, on May 8, 1848 appropriated $2,500 for an experimental school for idiotic children to be located in a wing of the Perkins Institute for the Blind in Boston. Howe was named director, and ten indigent "idiots" were selected as pupils. THIRD AND FINAL REPORT ON THE EXPERIMENTAL SCHOOL FOR TEACHING AND TRAINING IDIOTIC CHILDREN 305 (1852).

With perhaps a premonition of the evils that lurked in his creation, Howe stated in his final report: "Now the danger of misdirection in this pious and benevolent work is, that two false principles may be incorporated with the projected institutions which will be as rotten piles in the

foundations and make the future establishments deplorably defective and mischievous. These are, first, close congregation; and, second, the life-long association of a large number of idiots; whereas, the true, sound principles are: separation of idiots from each other; and then diffusion among the normal population. . . . For these and other reasons it is unwise to organize establishments for teaching and training idiotic children, upon such principles as will tend to make them become asylums for life. . . . *Even idiots have rights* which should be carefully considered! At any rate let us try for something which shall not imply segregating the wards in classes, removing them from our sight and knowledge, ridding ourselves of our responsibility as neighbors, and leaving the wards closely packed in establishments where the spirit of pauperism is surely engendered, and the morbid peculiarities of each are intensified by constant and close association of others of his class." S. G. HOWE, REPORT OF THE SUPERINTENDENT TO THE TRUSTEES OF THE MASSACHUSETTS SCHOOL FOR IDIOTIC CHILDREN (1874).

Howe's advice was forgotten and, by 1886, the Massachusetts legislature had established "a custodial department" for "custody of feeble-minded persons beyond the school age or not capable of being benefited by school instruction." 1886 Mass. Acts & Resolves, ch. 298, §1. After the turn of the century, commitment procedures were modified to permit *any* person, not just relatives, to seek the commitment of "feeble-minded" persons to the institution. *See* 1904 Mass. Acts & Resolves, ch. 459, §5; 1906 Mass. Acts & Resolves, ch. 508, §12.

The superintendent of Massachusetts' institution, Dr. Walter E. Fernald, reported in 1908 that "[t]he existence of this large institution is largely due to the demands of parents, physicians, clergymen, court officers, social workers, and thoughtful people generally, that feeble-minded women should be *permanently removed from the community*. In this State there is an urgent de-

mand for the commitment and *permanent detention* of the higher grade cases of defect, where the social incapacity and the moral weakness are more obvious than the mental backwardness. These cases cannot support themselves, and *are most undesirable and troublesome members of society.*" SIXTY-FIRST ANNUAL REPORT OF THE TRUSTEES OF THE MASSACHUSETTS SCHOOL FOR THE FEEBLE-MINDED AT WALTHAM, FOR THE YEAR ENDING NOVEMBER 30, 1908, at 22-23 (1909).

On June 12, 1912, Superintendent Fernald delivered an influential speech as the Annual Discourse before the Massachusetts Medical Society, printed and widely distributed in pamphlet form by the Massachusetts Society for Mental Hygiene: "The past few years have witnessed a striking awakening of professional and popular consciousness of the widespread prevalence of feeble-mindedness and its influence as a source of wretchedness to the patient himself and to his family, and as a causative factor in the production of crime, prostitution, pauperism, illegitimacy, intemperance and other complex social diseases. . . . The social and economic burdens of uncomplicated feeble-mindedness are only too well known. The feeble-minded are *a parasitic, predatory* class, never capable of self-support or of managing their own affairs. The great majority ultimately become public charges in some form. *They cause unutterable sorrow at home and are a menace and danger to the community.* Feeble-minded women are almost invariably immoral, and if at large usually become carriers of venereal disease or give birth to children who are as defective as themselves. The feeble-minded woman who marries is twice as prolific as the normal woman. . . . *[S]egregation* carried out thoroughly for a generation would largely reduce the amount of feeble-mindedness. The high-grade female imbecile group is the most dangerous class. They are not capable of becoming desirable or safe members of the community. They are never able to support themselves. They are certain to become sexual offenders and

to spread venereal disease or to give birth to degenerate children. Their numerous progeny usually become public charges as diseased or neglected children, imbeciles, epileptics, juvenile delinquents or later on as adult paupers or criminals. The segregation of this class should be rapidly extended until all not adequately guarded at home are placed under strict sexual quarantine. Hundreds of known cases of this sort are now at large because the institutions are overcrowded. Only 2000 feeble-minded persons are now cared for in institutions in this State, and over 1000 applicants are awaiting admission to the institutions. There is an *urgent demand for greatly increased institutional provision* for this class. . . ." W. FERNALD, THE BURDEN OF FEEBLE-MINDEDNESS 3, 7, 10 (1912).

New Hampshire. On March 22, 1901, the New Hampshire General Court enacted legislative to "establish and maintain" the "New Hampshire School for the Feeble-minded Children." 1901 N.H. Laws 597, ch. 102, §1. Although that law limited admissions to "the idiotic and feeble-minded, between three and twenty-one years of age," *id.*, amendments added four years later made provision for others "after they reach the age of twenty-one, if in the judgment of the board of trustees *their segregation seems to be for the best interests of the community*. . . ." 1905 N.H. Laws 413, ch. 23, §1, first for women, *id.*, and later for men as well, 1917 N.H. Laws 645, ch. 141, §1. Later, in 1917, the General Court adopted "AN ACT PERMITTING STERILIZING OPERATIONS" for those for whom that surgery "may be indicated for the prevention of the reproduction of further feeble-mindedness." 1917 N.H. Laws 704, ch. 181, §2. In 1929, the law was extended to permit the superintendent of the institution, if "of opinion that it is for the best interests of the inmate *and of society*" to authorize the surgery without the consent of the "feeble-minded" resident, if after a hearing the governing board of the institution finds that the resident "is the probable potential parent of *socially*

inadequate offspring likewise afflicted." 1929 N.H. Laws 162, 164, ch. 138, §§1, 6.

New Jersey. The New Jersey General Assembly in 1888 established the first New Jersey "home" for the "feeble-minded" at Vineland. 1888 N.J. Laws. 267, ch. 208.

By 1906, state officials were calling for permanent segregation: "It is a fact that the Institutions in New Jersey for the care and training of the feeble-minded do not begin in any way to cover the number of those who should be in the Institutions, and it seems that the Governor, the Legislature and the Commissioner of Charities in their wisdom might hold a conference with the Boards of the Feeble-Minded Institutions, looking towards *the segregation of all the feeble-minded who are now at large*. The feeble-minded belong to that class of defectives of either hereditary degenerates or whose condition is of such a character as should be treated like them, and for whom *the time has come for complete and permanent control.*" ANNUAL REPORT OF THE STATE HOME FOR THE CARE AND TRAINING OF FEEBLE-MINDED WOMEN AT VINELAND, 1906, at 6 (1907). The report indicated that "[t]he most celebrated authorities on the care and segregation of the feeble-minded and other defectives are very much in favor of *the colonization of all defectives* where the development of its members could be properly classified." *Id.* at 7.

The legislature began its response in 1911, by passing "An Act to authorize and provide for the sterilization of feeble-minded (including idiots, imbeciles and morons)." 1911 N.J. Laws 353, ch. 190. That law created a "Board of Examiners of Feeble-minded," which, upon a "find[ing] that procreation is inadvisable and that there is no probability that the condition of such inmate so examined will improve to such an extent as to render procreation by such inmate advisable," was authorized "to

perform such operation for the prevention of procreation as shall be decided by said board of examiners to be most effective. . . ." *Id.* §§ 1, 3.

Two years after its enactment, the New Jersey Supreme Court ruled that New Jersey's law violated the right to equal protection of the laws. *Smith v. Board of Examiners of Feeble-Minded*, 85 N.J.L. 46, 88 A. 963 (1913). The court noted that "the feeble-minded and epileptics are not the only persons in the community whose elimination as undesirable citizens would, or might in the judgment of the legislature, be a distinct benefit to society. . . . Racial differences, for instance, [also] might afford a basis for such an opinion in communities where that question is unfortunately a permanent and paramount issue." 88 A. at 965. The court concluded that "it is clear that the order with which we have to deal threatens possibly the life, and certainly the liberty, of the prosecutrix in a manner forbidden by both the state and federal Constitutions, unless such order is a valid exercise of the police power. . . . The general limitation of such power to which the prosecutrix must appeal is that under our system of government the artificial enhancement of the public welfare by the forceable suppression of the constitutional rights of the individual is inadmissible." *Id.* at 965.

In 1915, the legislature provided for more pervasive segregation of retarded people through the admission to Vineland of "mentally defective men, women and children, *of all ages and grades*. . . ." 1915 N.J. Laws 278, ch. 151, § 2. By 1918, the lawmakers had authorized "the location of additional colonies upon forest reserve or other lands owned by the State." 1918 N.J. Laws 410, ch. 147, art. 6 § 636. It was in these institutions that the "inmates" were to be "kept." *Id.* at 409, 410, §§ 631, 635. In 1919, the legislature required relatives "to *waive all right to remove either permanently or for a limited time*" their kin from any institution. 1919 N.J. Laws 508, ch. 217, § 3.

New York. On July 10, 1851, the Legislature of New York adopted "AN ACT to establish an asylum for idiots." 1851 N.Y. Laws 941, ch. 502.

It was not until 1894 that the New York legislature established an institution in Oneida County purely for the "*custody* of unteachable idiots," designated as "the Rome State Custodial Asylum." 1894 N.Y. Laws 806, ch. 382.

The movement to segregate began most earnestly at the same time as the citizenry began to express concern about the "rising tide" of immigration. In 1905, for example, an article in the *New York Times* typical of those appearing during this period discussed the urgent need for "remedying the evils which have too long been tolerated in the 'dumping' of undesirable immigrants into this country." *Undesirable Immigration*, N.Y. Times, Feb. 10, 1905, at 6, col. 3.

In 1911, the first of many studies purporting to link "feeblemindedness" with the new immigration was published under the auspices of the State Charities Aid Association. The survey found that all but 40 of 317 "mentally defective" children selected "at random" from thirty-two ungraded classes in the New York public schools were either foreign-born or the children of foreign parents. A. MOORE, THE FEEBLE-MINDED IN NEW YORK: A REPORT PREPARED FOR THE PUBLIC EDUCATION ASSOCIATION OF NEW YORK, N.Y. (1911).

By 1912, the *New York Times* was reporting a definite link between immigration and "feeble-mindedness." An article appearing on February 18, 1912 quoted "[a]n important report of the special committee appointed by the New York Society for the Prevention of Cruelty to Children to investigate the subject of abnormal and feeble-minded children. . . ." *Feeble-Minded Scholars Make Up 1 Per Cent of the School Population, Investigators Report*, N.Y. Times, Feb. 18, 1912, at 8, col. 4. The report stated that there were in New York City "10,000 mental or moral defectives who now roam at large

in the community without any proper parental supervision or medical care. Recent census statistics show that 80 per cent of the feeble-minded children in the general population of the United States are the progeny of aliens or naturalized citizens. We may safely assume, therefore, that at least 8,000 of the 10,000 feeble-minded children in the city today were brought here by or are the offspring of the 9,000,000 aliens who have passed through Ellis Island during the past ten years." *Quoted in id.* at cols. 4-5.

Three weeks later, the *New York Times* featured an article on Henry H. Goddard, who was a state administrator for New Jersey's retardation institution at Vineland. The report began: "From the army of 300,000 feeble-minded persons in the United States come the recruits that swell the ranks of the drunkards, criminals, paupers, and other social outcasts. Twenty-five per cent of the girls and boys in our reformatories are lacking in mental fibre and are unable to discern the difference between right and wrong or are too weak in character to do right whenever there is any inducement to do wrong. Sixty-five per cent of the feeble-minded children have a mother or a father, or both, who are feeble-minded. This country has so far taken no steps to segregate these irresponsible parents, so the number of them is constantly increasing. These facts, and many more equally startling, are set forth in an article written for The Survey by Dr. Henry H. Stoddard, [*sic*] director of the department of research of the training school at Vineland, N.J. 'Our Government spends hundreds of thousands of dollars examining immigrants to see that none who are feeble-minded are admitted,' writes Dr. Stoddard [*sic*]; 'but here is a group already in our country who are breeding a race of feeble-minded people more dangerous than many barred by the Immigration Inspectors.' " *Weak-Minded Fill Ranks of Criminals: Dr. Henry Stoddard [sic] Says Social Problems Can Be Solved By Segregating Them*, N.Y. Times, Mar. 10, 1912, at 6, col. 3. Goddard urged, in language

later quoted in some state statutes, "permanent care where they will be happy and harmless," for all those "unable to compete with their fellows on equal terms. . . . This army furnishes the recruits for the ranks of the criminals, paupers, drunkards, the ne-er-do-wells, and others who are social misfits." *Quoted in id.* "[W]hat then is to be done?" he asked. Dr. Goddard answered his own question by proposing that "[a]fter these cases have been discovered they must be removed from the environment in which it has been proved *they are incapable of living normal lives in accordance with the conventions of society*. They must be colonized in groups where they may be perfectly happy and somewhat useful. Only one limitation needs be placed upon them in these places, and that is they must never become parents." *Quoted in id.* Goddard concluded by emphasizing that "[w]e are discussing a possible State policy . . . many parents are either normal or of such a high grade of defectiveness that they never get into court and yet have feeble-minded children. We cannot touch these adults. We must somehow get hold of their children. . . . We may reasonably hope that a policy of segregation, carefully followed, will in a generation or two largely reduce our feeble-minded population and thereby solve our problems of criminals, disease, drunkenness, and crime." *Quoted in id.* at cols. 3-4.

On April 16, 1912, the legislature created a new state board and empowered it to authorize the sterilization "by such operation for the prevention of procreation as shall be decided by said board to be most effective," "any" institutionalized person who, in the judgment of the board, "would produce children with an inherited *tendency*" to "feeble-mindedness, idiocy or imbecility." 1912 N.Y. Laws 924, 925, ch. 445, §351.

New York's special treatment of its "alien defectives" during this period is evidenced by the response state officials gave to a survey form sent to each state on June 20, 1912 by a Pennsylvania commission gathering information to assist the latter state in expanding its own in-

stitutions. New York's response indicated that the state already had nearly 6,000 citizens segregated, noting specially that it "contributes towards the support of *the alien* poor patients in these institutions." REPORT OF THE COMMISSION ON THE SEGREGATION, CARE AND TREATMENT OF FEEBLE-MINDED AND EPILEPTIC PERSONS IN THE COMMONWEALTH OF PENNSYLVANIA 28, 31 (1913). No other group was singled out by New York officials for special support.

It was also about this time that the newly reknowned Henry Goddard was invited by the United States Public Health Service to administer Binet's I.Q. test to the southern and eastern European immigrants arriving in steerage at Ellis Island. "[G]iv[ing] the immigrant the benefit of every doubt," he found that 79% of the Italians, 80% of the Hungarians, 83% of the Jews, and 87% of the Russians he tested were "feeble-minded." Goddard, *Mental Testing and the Immigrants*, 2 J. DELINQUENCY 243, 249, 252 (1917).

The *New York Times* reported in an article entitled *Alien Defectives* appearing on January 13, 1913 that since "three-tenths of feeble-minded children are of alien or naturalized parents, the problem of detecting defective immigrants is very grave." N.Y. Times, Jan. 13, 1913, at 10. The account cited a recommendation by Assistant Surgeon C. P. Knight of the United States Public Health Service at Ellis Island, writing in the January 11 issue of the *American Medical Association Journal*, for "controlling the procreation of the mentally defective by segregating them." *Alien Defectives*, *supra*. As Dr. Knight had stated, "[t]here is scarcely a ship coming into the Port of New York which does not carry among its passengers a mental defective of some degree." *Id.*, *quoting* Knight, *The Detection of the Mentally Defective Among Immigrants*, 60 A.M.A.J. 106 (1913).

In the *A.M.A. Journal* article, Dr. Knight explained that he had "becom[e] familiar with different races" so he could "tell at a glance the abnormal from the normal."

Id. at 107. "In studying the physical characteristics of mental defectives, the various ethnologic types are easily discerned: the dark skin, the curly hair and thick lips of the Ethiopian, the prominent and high cheekbones and deep orbits of the American Indian and the straight coarse hair and peculiar cast of countenance of the Mongolian." *Id.* Even "more important in the determination of the mental status of the alien," according to Dr. Knight, was "close application to the study of the race." Thus, examiners "should interpret the mental reaction of the alien only after having full knowledge of the different racial characteristics, for that which is a defect in an individual of *a race of high mental attainment* may be a normal condition in the existence of other *people who have not attained the same grade of development*. It is perfectly normal for the southern Italian to show emotion on the slightest provocation but should he show the stolidity and indifference of the Pole or Russian, we would look on him with suspicion and perhaps hold him for a detailed examination." *Id.* By the use of such techniques, Knight hoped to "reduc[e] to a minimum the entrance into this country of the mentally and morally low type of alien. Immigration largely contributes to the high percentage of this class in the United States." *Id.* at 106.

By 1914, the "defectives" were being expelled from the public schools. As the *New York Times* editorialized: "If the policy recommended by the Board of Education's committee on ungraded classes had been sensibly adopted in the beginning a good deal of money might have been saved for teaching sound-minded children that has been wasted on mental defectives who could not be helped. The report says: 'Most imbeciles and all idiots can in no way derive any lasting benefits from attendance at the public schools. Their mental condition cannot be improved either by the course of study or discipline. The only practical and humane solution is institutional care.'" *The Feeble-Minded in Schools*, N.Y. Times, Mar. 13, 1914, at 8, col. 4.

That same year, as a result of the public demand for action, the legislature created a special State Commission to study the problem, as urged by the *New York Times*. 1914 N.Y. Laws 772, ch. 272.

The Commission believed that "we are now in a position where it is both a duty and a privilege to *adopt a complete system of public provision* that will in a very large measure *eliminate the burden of feeble-mindedness from the community*." *Id.* at 18.

Sterilization, according to the Commission, was no panacea, since surgery prevented only parenthood, and did not eliminate the other social menaces stemming from permitting "defectives" to be at large. Moreover, such a law might lead to "withdraw[l] from *the influence of our institutions* large numbers of feeble-minded who otherwise might be amenable to whatever advantages and *whatever custodial provision was made*." *Id.* at 19. STATE OF NEW YORK, REPORT OF THE STATE COMMISSION TO INVESTIGATE PROVISION FOR THE MENTALLY DEFICIENT 19 (1915).

The major problem, according to state officials, was that thousands of "mental defectives are at liberty in the community today . . . without restraint or public control." *Id.* at 34. "To attempt reformation is a gross waste of time and of money. The average cost per inmate in a specially organized institution for defectives is half of the average cost in our reformatory institutions." *Id.* at 35. The solution was to expand the institutions and to bring more of the "defectives" under control.

Accordingly, the legislature enacted on May 14, 1919 "AN ACT in relation to mental defectives. . . ." 1919 N.Y. Laws 1683, ch. 633. The law defined "mental defective" to mean "*any person afflicted with mental defectiveness* from birth or from an early age to such an extent that he is incapable of managing himself and his affairs, who for his own welfare or the welfare of others *or of the community* requires *supervision, control* or care, and who is not insane or of unsound mind." *Id.* at 1684, art. 1, § 2(5).

The legislation established a procedure for certifying that one's mental defect was "of such a nature as to require his *supervision, control* and care for his own welfare and for the welfare of others *or for the welfare of the community.*" *Id.* at 1697, art. 4, § 26. This determination was to be made by "qualified examiners." *Id.* § 25.

As a result of this law, state officials were soon overwhelmed with retarded people to segregate. The State Commission for Mental Defectives indicated in 1926 that although it was "gratifying to report progress during the year in additional housing for mental defectives[, t]he need of more beds is so great that it outweighs other considerations." STATE OF NEW YORK, EIGHTH ANNUAL REPORT OF THE STATE COMMISSION FOR MENTAL DEFECTIVES, JULY 1, 1925 TO JUNE 30, 1926, at 7 (Leg. Doc. No. 92, 1927). The scope of the physical expansion necessitated by the 1919 law was noted in the agency's Annual Report: "Defectives who are detrimental to society cannot *be segregated* until institution bed capacity is increased. Those of too low grade intelligence to be cared for in the public schools are often neglected at home and a source of economic disaster to the family. *The segregation of these in institutions* awaits erection of new buildings." *Id.* Thousands of beds were planned and provided throughout the state. *Id.*

Pennsylvania. In 1893 the Pennsylvania General Assembly authorized the construction of a large institution in western Pennsylvania with a capacity for at least "eight hundred inmates," to include a "custodial or asylum department." 1893 Pa. Laws 289, 290, No. 256, § 7. The facility was to be for the "reception" and "detention" of "idiotic and feeble-minded children," *id.* at 291, § 10, the sole restriction being that they be "under the age of twenty years," *id.* § 11. By 1903, a second institution similarly organized was authorized to be built in the eastern part of the state. 1903 Pa. Laws 446, No. 424.

In 1911, the Pennsylvania Conference of Charities and Corrections argued to the legislature that it had a

large problem on its hands. The legislature decided that a comprehensive study was necessary, and so adopted a joint resolution to establish a special commission, "the duty of which Commission shall be to take into consideration the number and status of feeble-minded and epileptic persons in the Commonwealth and the increase of such persons, and to report to the General Assembly at its next session a plan or plans *for the segregation*, care, and treatment of such defectives. . . ." 1911 Pa. Laws 927, § 1. The resolution was enacted because the legislature felt that "[a] proper regard for the public welfare requires that some action be taken looking to *the segregation* of such feeble-minded and epileptic persons." *Id.* (preamble).

On April 21, 1913, the Commission reported to the legislature that "[w]here the mental disability is of a degree which renders the afflicted individuals *unfit for citizenship*, or a menace to the peace, they are regarded and treated as *anti-social beings, and may be permanently segregated* in institutions especially constructed for their reception and care. The condition of mind in amentia is irremediable[;] *the segregation as the rule should therefore be permanent.*" REPORT OF THE COMMISSION ON THE SEGREGATION, CARE AND TREATMENT OF FEEBLE-MINDED AND EPILEPTIC PERSONS IN THE COMMONWEALTH OF PENNSYLVANIA 43 (1913).

The Commission considered retarded people "such an unpleasant burden, that parents usually are more than willing to part with them," *id.* at 38, but "[l]egislation" was "needed to *compel the segregation* of feeble-minded and epileptic persons," *id.* at 40. Who was to be incarcerated? "[A] type of mind must be established as a normal standard for the age, *race* and social status of each individual, and he who falls below this to a recognizable degree is *ipso facto* feeble-minded." *Id.* at 42.

Six weeks later, the legislature enacted comprehensive legislation, creating a new official purpose for the state's institution: "*segregation*" of all "idiotic, imbecile

or feeble-minded persons," 1913 Pa. Laws 494, No. 328, § 1, and the removal of all age restrictions on admissions, *id.* at 496, § 3. The lawmakers also established a new "Village for Feeble-Minded Women" to be "entirely and specially devoted to the reception, segregation [and] detention" of "feeble-minded women of child-bearing age. . . ." 1913 Pa. Laws 1319, No. 817. By 1922, the Superintendent of the Eastern Pennsylvania State Institution for the Feeble-Minded was reporting that "the general public [is] now convinced more than ever that it is a good thing to *segregate the idiot and the imbecile.*" R. SMILOVITZ, A BRIEF HISTORY OF PENNHURST 1908-1926, COMPILED FROM SUPERINTENDENT'S DOCUMENTS (1974).

Rhode Island. The General Assembly of Rhode Island enacted in 1907 "AN ACT FOR THE ESTABLISHMENT, MAINTENANCE, MANAGEMENT, AND CONTROL OF THE RHODE ISLAND SCHOOL FOR THE FEEBLE-MINDED." 1907 R.I. Pub. Laws 89, ch. 1470. Within the institution there was created a special "custodial department for the care and custody of feeble-minded persons beyond school age, or who are not capable of being benefited by school instruction." *Id.* at 90, § 3. Institutionalization could be sought by filing a "complaint in writing" alleging that "any person within the district wherein such court is established is feeble-minded, so as to require restraint for his own welfare *or for the welfare of the public.*" *Id.* at 91, § 6.

The purpose of the institution, according to the first annual report to the legislature, was to "not only protect the [feeble-minded] children themselves, but at the same time *to guard society against the children.*" REPORT OF THE RHODE ISLAND SCHOOL FOR THE FEEBLE-MINDED IN EXETER 20 (1910). State officials strongly encouraged parents to commit their children voluntarily to the facility: "Society is made up of families and when the family suffers society suffers. Talk with any one who has had the opportunity to know intimately the history of families

in which there have been feeble-minded children, and let him tell of the cases of fathers driven to drink, whole families plunged into poverty and pauperism, and of mothers made insane or even done to death *by the presence* of the unfortunate child in the home." *Id.* at 21.

Vermont. In 1913, the General Assembly of Vermont created the "Vermont State School for Feeble-minded Children." 1913 Vt. Acts 96, No. 81, § 1. Proceedings to place a retarded person in the institution could be initiated by, in addition to a parent or guardian, any "selectman of the town . . . in which such child resides." *Id.* at 98, § 13.

In 1916, state officials "report[ed] that the people in Vermont are beginning to take a marked interest in the study of feeble-mindedness, and *its baneful and increasing effects on the population* of the State, and that with a better understanding of the conditions which exist, there will be a tendency to view the handling of the question in a more practical and common sense manner. The burden of feeble-mindedness is felt by the entire public, and every intelligent person who has carefully considered the subject realizes that *this blight on mankind* is increasing at a rapid rate, and that unless radical measures are adopted to curb the influences which tend to promote its growth it will only be a matter of time before the resulting pauperism and criminality will be a burden too heavy for any country or people to bear. *The feeble-minded are a parasitic, predatory class*, never capable of self-support or of managing their own affairs, and the majority of them ultimately become public charges." REPORT OF THE VERMONT STATE SCHOOL FOR THE FEEBLE-MINDED CHILDREN FOR THE PERIOD ENDING SEPTEMBER 30, 1916, at 17-18 (1916).

As a result of the actions of the state, "[t]he public is now fully aware of *the danger the defective is at large* and realizes the importance of instituting means for their control. There is nothing that can be done more effectively toward the prevention of feeble-mindedness, crime and

poverty and *toward the promotion of our best citizenship, than to segregate the feeble-minded* and properly care for them." *Id.* at 18.

Midwestern States

Illinois. On June 24, 1915, the Illinois General Assembly passed a bill establishing a facility as an institution for the "*detention* of feeble-minded persons." 1915 Ill. Laws 245. Such "detention" was mandated not only for the retarded person's "own welfare," but also "for the welfare of others, *or for the welfare of the community*," so long as the person was "not classifiable as an 'insane person.' " *Id.* at 245-46, §1. "*[A]ny* reputable citizen of the county in which such supposed feeble-minded person resides or is found could seek the institutionalization of such a person by filing a petition stating that it was detrimental "*to the welfare of the community, for him to be at large.*" *Id.* at 246, §3. The "guiding and controlling thought of the court" at these proceedings was to be not only "the welfare of the feeble-minded person" but also "the *welfare of the community.*" *Id.* at 249, § 9.

Indiana. In 1914, Indiana officials reported to the Governor that there were still "at the most conservative estimate that can be made, at least four thousand feeble-minded in Indiana" requiring institutionalization, and that "[these] people are at large, *a nuisance to the community* in which they live; nearly all of them paupers; many of them petty criminals; the women filling the houses of prostitution; all of them poor, improvident, lazy — in short, incompetents. These people are increasing rapidly, and unless cared for will, in the next hundred years, bring an unbearable burden on our grandchildren and great-grandchildren. Shall we leave them such an inheritance, or shall we do something now to stop it? Were we to put all these four thousand defectives now at large into institutional care today, this institution could provide for practically all needing the care of an institu-

tion at the end of the next fifty years. No provision is made for adult male feeble-minded in this State, and these men *should be segregated from the world* in some place where they could be made in a measure self-supporting." THIRTY-SIXTH ANNUAL REPORT OF THE INDIANA SCHOOL FOR FEEBLE-MINDED YOUTH FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 1914, at 14 (1914).

In 1915, the Board of State Charities of Indiana adopted a resolution that read: "Whereas, The problem of the mental defective is one of our greatest social as well as financial burdens and is increasing in importance and weight every year, and Whereas, Mental defectiveness is believed to be one of the most important if not the most important cause of pauperism, degeneracy and crime," resolved that a committee be established to make recommendations concerning this problem. Governor Ralston acted favorably on this resolution and appointed a Committee on Mental Defectives.

The work of the Committee and its first report, on November 10, 1916, was used to convince the governor and the legislature that it was "imperative that the State must very soon take cognizance of the large number of dependent defectives at large in the State, a menace to society, increasing at a rapid rate, and take steps *to segregate them from the public*, and thus check their reproduction not alone as a matter of philanthropy, but as an economic measure." THIRTY-EIGHTH ANNUAL REPORT OF THE INDIANA SCHOOL FOR FEEBLE-MINDED YOUTH, FORT WAYNE, INDIANA, FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 1916, at 14 (1917). The Indiana officials were also "pleased to note that 'The Committee on Mental Defectives' appointed by you to study the problem of Mental Defectiveness in Indiana, recently urgently recommended the enactment of such a law, and we wish to strongly endorse their recommendation and urge that this remedial legislation be had at the coming session of the Legislature. We have deeply felt the need of this law in several cases in recent years, where we found ourselves

utterly helpless to prevent the withdrawal of girls by parents or relatives while we knew that were *unfit to be out in the world. . . .*" *Id.* at 15. They also recommended "the establishment of a new and separate institution to house them from *the danger of contact with the public.*" *Id.*

The Committee on Mental Defectives was reappointed by newly elected Governor James P. Goodrich. The Committee's second report was published March 6, 1919.

One week later, the General Assembly passed as "emergency" legislation "AN ACT to provide for the establishment and government of an Indiana farm colony for feeble-minded" which incorporated practically all of the recommendations of the Committee on Mental Defectives. 1919 Ind. Acts 480, ch. 94. The lawmakers created a commission and ordered it to "select a suitable site for the farm colony" and to "purchase not less than 1,000 acres of land in a body" for it. *Id.* § 2. The law specified that "the buildings to be constructed for its use shall be plain and inexpensive in character," *id.* at 482, § 6, and required that "the labor in constructing such buildings, improvements and facilities shall be supplied as far as applicable by the persons committed to the institution," *id.*

The Committee on Mental Defectives, while expressing gratitude for this legislation, "recommend[ed] increased provision at the Farm Colony for Feeble-Minded" in order for the state "to provide adequately for such cases as cannot, without *menace to the community*, be provided for in the home or the public school." MENTAL DEFECTIVES IN INDIANA: THIRD REPORT OF THE INDIANA COMMITTEE ON MENTAL DEFECTIVES 8 (1922).

The exact nature of the menace was described by the Governor's Committee as follows: "The uncared-for insane, epileptic and feebleminded constitute a social menace, but the *part played by the feebleminded in discounting social progress is by far the most potent influence for evil under which society is struggling today. . . .*

Modern theory grants that the rights of the individual must not interfere with the welfare of the community. From the latter standpoint, the mental defective must be considered as a possible financial burden to the community, a potential menace through the commission of crime, and an increasing detriment to the race through the propagation of his kind. . . . What subject is more vital than this to the people of our state? The menace of the mental defective is a real and pressing one. All individuals and organizations interested in human welfare are urged to cooperate in a state-wide program for *informing the citizens of our state concerning the dangers that threaten*, and awakening them to the disastrous consequences if this important matter is neglected. This should result in such united action as will lessen the burden of pauperism, degeneracy, disease and crime, and decrease the cost to the taxpayers." *Id.* at 6.

In addition to appropriating the increased funds requested for segregation, the legislature, on March 3, 1931, passed "AN ACT providing for the sexual sterilization of feeble minded persons." 1931 Ind. Acts 116, ch. 50. Indiana has been the first state in the country to enact a sterilization law. 1907 Ind. Acts 877, ch. 215. The new law provided that, *at the point at which commitment of any mentally retarded person was sought*, "it shall be the duty of each of the examining physicians appointed by the court" to "certify to the court whether, in his opinion, such person is the probable potential parent of mentally incompetent *or socially inadequate* offspring likewise afflicted." *Id.* § 1. Upon a finding by the court that "the welfare of society and of such feeble-minded person will be promoted by his or her sterilization," the superintendent "may have performed upon such feeble-minded person" sterilization surgery "at such time as he may deem expedient." *Id.* § 3.

Iowa. On March 17, 1876, the General Assembly of Iowa enacted legislation "FOR THE ESTABLISHMENT OF AN ASYLUM FOR FEEBLE MINDED CHIL-

DREN." 1876 Iowa Acts 145, ch. 152. Admission was originally limited to "children between the ages of seven and eighteen." *Id.* at 148, § 15. After the turn of the century, the state authorized the segregation of increased numbers of retarded people. The first to be confined, by enactment of April 7, 1902, were "all feeble-minded women under forty-six years of age." 1902 Iowa Acts 73, ch. 118. The next were "all feeble minded men under 46 years of age." 1909 Iowa Acts 171, ch. 173. In 1921, all age restrictions were repealed. 1921 Iowa Acts 126, ch. 129. State officials continually campaigned for the expansion of facilities for segregation, *see, e.g.*, TWENTY-FOURTH BIENNIAL REPORT OF THE SUPERINTENDENT OF THE IOWA INSTITUTION FOR THE FEEBLEMINDED 7-8 (1922).

On April 13, 1929, the General Assembly enacted legislation "to create a state board of eugenics, to define the powers and duties of said board, [and] to fix the procedure in the sexual sterilization of persons." 1929 Iowa Acts 106, ch. 66. The members of the Board of Eugenics, which consisted of not only the superintendents of state institutions, but also the commissioner of public health, were ordered to "report to the state board of eugenics the names of all persons, male or female, living in this state, of whom he or she may have knowledge, who are feeble-minded . . . and who are a menace to society." *Id.* § 2.

Kansas. In 1881, the Legislature of Kansas established "the Kansas state asylum for idiotic and imbecile youth." 1881 Kan. Sess. Laws 74, ch. 35. Admission was limited to those "not over fifteen years of age." *Id.* at 75, § 6.

The superintendent of the institution, I.W. Clark, in 1906 urged the adoption of a law to enlarge the institution and to accomplish the segregation of feeble-minded persons of all ages. THIRTEENTH BIENNIAL REPORT OF THE KANSAS SCHOOL FOR FEEBLE-MINDED YOUTH, WINFIELD, KANSAS, FOR THE TWO YEARS ENDING JUNE 30, 1906, at 6 (1906). According to Superintendent Clark:

"Legislative attention to a more extended provision for the idiotic and feeble-minded is an imperative demand upon the state. For a score of years the opinions of philanthropists and of those interested in sociologic work have been steadily advancing in a certain direction, until now they are unanimously convinced that *as a matter of public policy all the feeble-minded class should be segregated and provided for by the state*. Various are the reasons which have led up to this conviction, and to most persons they are easily obvious. In this state to-day there are in the county-houses, and *in the communities at large, a large number of this class who are a menace, a blight and a misfortune both to themselves and to the public.*" *Id.* at 12. Therefore, the superintendent recommended that "[t]he age limit of fifteen years should be removed, and the capacity of the home be enlarged so as to receive *all persons who are feeble-minded, regardless of age.*" *Id.* at 6.

On March 12, 1909, the legislature acted. The name of the institution was "hereby changed to the State Home for Feeble-minded," and "[a]ll inmates admitted to said institution" were placed "under the custody and control of the superintendent of said institution, and the superintendent may restrain any such inmate when he deems it necessary for the welfare of such inmate and the proper conduct of the institution." 1909 Kan. Sess. Laws 560-61, ch. 233, §§ 1, 2.

In 1917, the legislature enacted a law providing that, if the Superintendent of the State Home for Feeble-minded "shall certify in writing" to the institution's governing board "that he or she believes that the mental or physical condition of any inmate would be improved thereby or that procreation by such inmate would be likely to result in defective or feeble-minded children with criminal tendencies, and that the condition of such inmate is not likely to improve so as to make procreation by such person *desirable or beneficial to the state*, [then] it shall be lawful to perform a surgical operation for the sterili-

zation of such inmate." 1917 Kan. Sess. Laws 443, ch. 299, § 1.

State officials applauded this legislation, and predicted a marked decrease in the number of feeble-minded persons. However, they reported that "the decrease will be nothing like so great as it should be *unless our immigration laws are so changed as to greatly reduce the number of undesirables from Europe entering this country*. . . . We shall be disappointed further that the decrease is no greater on account of the ease with which feeble-minded persons may obtain a marriage certificate, enter the marriage state and rear a family like unto themselves. . . . Asexualization will be condemned by some as being too harsh a measure, but it becomes incumbent on those who would discourage it to offer something better, for the future will compel us to act. If society by her philanthropic efforts annuls the law of the survival of the fittest, then self-interest will compel her to adopt measures which will prevent the multiplication of those who at best can only add degeneracy to the race." TWENTIETH BIENNIAL REPORT OF THE STATE TRAINING SCHOOL FOR THE TWO YEARS ENDING JUNE 30, 1920, at 7-8 (1920).

Two years later, the superintendent reported "that the population of the institution has grown steadily," and noted "the increased activity of welfare and Red Cross associations over the state that are *constantly on the lookout* for unfortunate people, both young and old" to be institutionalized. TWENTY-FIRST BIENNIAL REPORT OF THE STATE TRAINING SCHOOL FOR THE TWO YEARS ENDING JUNE 30, 1922, at 3 (1922). As a result of the state's policies, people were persuaded to place their retarded relatives in the institution. The Superintendent noted that "as a consequence our ward buildings are becoming crowded, some wards housing twenty per cent more than the estimated capacity. Additional ward room is a necessity." *Id.* at 11.

Kentucky. The General Assembly of the Commonwealth of Kentucky first chartered the "Kentucky Institution for Feeble-minded Children" as a corporate entity in 1894, although the facility apparently had been in existence previous to that date. *See* 1894 Ky. Acts 96, ch. 48, art. I, § 1. Admission to the institution at that time was limited to persons aged six through eighteen "whose mental condition is such that, in the judgment of the superintendent, they may be taught to read and write, or can be educated or trained to do work." *Id.* at 115, art. III, § 5.

In 1918, the General Assembly enacted more malevolent legislation, entitled "AN ACT to provide for the commitment, care, treatment, training, *segregation* and custody" of "feeble-minded" persons. 1918 Ky. Acts 156, ch. 54. The law defined "feeble-minded person" as one who "requires supervision, care, training, control or custody for his own welfare or for the welfare of others *or the community.*" *Id.* § 1. It also established and authorized "The Farm Colony for the Feeble-Minded." including an ambitious plan for new construction on a 500-acre site. *Id.* at 156-57, 159-60, §§ 1, 9, 10. Proceedings to confine a person in the institution could be instituted against any person in the county who appears to be . . . feeble-minded." *Id.* at 161, § 16. The same law made it "one of the special duties of every *health officer and of every public health nurse to institute proceedings to secure the proper segregation and custody of feeble-minded persons*, likely to become fathers or mothers of other feeble-minded persons." *id.*, at 171, § 30, and made it a crime "to aid or abet the marriage of any feeble-minded person, and any person found guilty of aiding or abetting such marriage shall be fined not less than fifty dollars, nor more than five hundred dollars."*id.* § 32.

Michigan. In 1893, the Michigan Legislature established the "Home for the Feeble-Minded and Epileptic." 1893 Mich. Pub. Acts 412, No. 209. The institution was available to "[a]ll feeble-minded and epileptic persons be-

tween the ages of six and twenty-one." *Id.* at 416, §§ 20, 21.

In 1905, to insure long-term segregation, the legislature required that parents and guardians admitting their children to the home "*waive all right to remove* such inmate thereafter either permanently or for a limited time." 1905 Mich. Pub. Acts 169-70, No. 121.

A more comprehensive revision of the law took place four years later, 1909 Mich. Pub. Acts 189, No. 101, eliminating age restrictions, *id.* at 192, § 13, providing for roving physicians "empowered to go where such feeble-minded and epileptic person may be and make such personal examination of him as to enable them to offer an opinion as to his mental condition" in order to certify them as "feeble-minded," *id.* § 14.

If, following a hearing, "such person shall be found and adjudged to be feeble-minded or epileptic the court shall immediately issue an order for his admission to the home for the feeble-minded." *Id.* at 194.

State officials described the value of the new law in maintaining life-long segregation and control in their report to Governor Woodbridge Ferris: "Prior to the enactment of the law of 1909, patients were admitted to this institution by direct application either by parents, guardians, or certain public officials. The matter of the status of these patients was constantly before the Board of Control. The Board found it impossible to *hold certain cases where, in their opinion, the welfare of the State would dictate their being held.* We therefore went to the Legislature, requesting the passage of an act bringing all these cases, where the patient had not had his day in court, before the Probate Courts of the several counties for review and legal commitment. We now have no patients not committed by the Probate Court." TENTH BIENNIAL REPORT OF THE BOARD OF CONTROL OF THE MICHIGAN HOME AND TRAINING SCHOOL AT LAPEER FOR THE BIENNIAL PERIOD ENDING JUNE 30, 1914 (1914).

As John N. McCormick, Chairman of the State Board of Corrections and Charities later stated in official, published instructions to Dr. H. A. Haynes, Superintendent of the Michigan home: "The members of this Board consider it imperative that ample provision be made for the *segregation* and proper care of feeble-minded persons. A recent survey of Michigan removes any doubt as to *the plain duty of the State regarding feeble-mindedness*, not only from a sociological but an economical standpoint as well. From our discussion of the situation with you at the meeting of this Board held at your institution, we are of the opinion that the items stated in your estimate of appropriations for the next two years are needed, and the same are hereby approved." ELEVENTH BIENNIAL REPORT OF THE BOARD OF CONTROL OF THE MICHIGAN HOME AND TRAINING SCHOOL AT LAPEER FOR THE BIENNIAL PERIOD ENDING JUNE 30, 1916, at 7 (1916).

On May 25, 1923, the Michigan legislature adopted "AN ACT to authorize the sterilization of mentally defective persons," which class was "deemed to include idiots, imbeciles and the feeble-minded, but not insane persons." 1923 Mich. Pub. Acts 453, No. 285, § 1. "Whenever a person is adjudged defective," the court was authorized to "order such treatment by x-rays or operation of vasectomy or salpingectomy. . . ." *Id.* at 454, § 2.

In a 1929 amendment, the legislature "hereby declared [it] to be the policy of the state to prevent the procreation and increase in number of feeble-minded, insane and epileptic persons, idiots, imbeciles, moral degenerates, and sexual perverts, *likely to become a menace to society* or wards of the state. *The provisions of this act are to be liberally construed to accomplish this purpose.*" 1929 Mich. Pub. Acts 689-90, No. 281, § 1. The law made it "the duty" of state officials operating the Home for Feeble-minded "to bring to the attention of the governing board or body of such institution and to the state welfare commission" any "mentally defective person who would be likely to procreate children unless

closely confined or rendered incapable of procreation" for whom they were "of the opinion" that it would be "for the best interest of such person *and of society* that such mentally defective person should be sexually sterilized." *Id.* at 690, § 4. The law made it "the duty," in turn, of "the governing board or body of such institution and the state welfare commission to cause an investigation, and examination to be made to determine whether such mentally defective person would be likely, *if allowed to mingle in society*, to procreate children having an inherited tendency to feeble-mindedness, insanity, idiocy, imbecility, epilepsy, or sexual degeneracy, and who *would be likely to become a social menace* or a ward of the state, and whether there is no probability that the condition of such person would improve to such an extent as to avoid such consequences." *Id.* at 690-91.

Minnesota. In 1909, the legislature of Minnesota enacted a law "providing a department for incurables" for "all idiotic and epileptic persons resident of the state. . . ." 1909 Minn. Laws 72, ch. 80. A decade later, because the institution, located at Faribault, had filled beyond capacity, the legislature authorized the state board of control "to select from the public lands of this state, the title to which is vested in the state, not to exceed two (2) sections of land to be used as a location for a colony for feeble-minded persons. . . ." 1919 Minn. Laws 475, ch. 407, § 1. In 1925, the legislature authorized residents of its institutions "to be sterilized by the operation of vasectomy or tubectomy." 1925 Minn. Laws 140, ch. 154.

Missouri. In 1899, the "Missouri Colony for the Feeble-minded" was established. 1899 Mo. Laws 1821, ch. 118, art. 10. As the institution's population grew, the "board of managers of said colony" was "empowered to establish other colonies in temporary or permanent camps." 1919 Mo. Laws 183-84, § 2.

State officials continually requested increased appropriations for expansion. In one annual report to the legislature, for example, Dr. E. E. Brunner, superintend-

ent of the institution, stated: "We need another building to care for the custodial type of idiot patients as that building is entirely overcrowded." SIXTH BIENNIAL REPORT OF THE BOARD OF MANAGERS OF THE STATE ELEEMOSYNARY INSTITUTIONS TO THE FIFTY-SEVENTH GENERAL ASSEMBLY OF THE STATE OF MISSOURI FOR THE TWO FISCAL YEARS BEGINNING JANUARY 1, 1931, AND ENDING DECEMBER 31, 1932, at 291 (1933). According to Superintendent Brunner, "[t]he number of applications is not an indication that the number of feeble-minded is on the increase in the State, but to the education of the people of the State as to *the significance of feeble-mindedness and the need of permanent custodial care. . . .*" *Id.* at 288.

Nebraska. On March 5, 1885, the Legislature of Nebraska passed "AN ACT to establish and endow an Asylum Home for feeble-minded children and adults at or near the city of Beatrice, Nebraska, and making appropriation and levy therefor." 1885 Neb. Laws 255, ch. 52.

By 1914, Silas A. Holcomb, chairman of the newly established state Board of Commissioners, was writing in his first report to the governor and legislature that "[t]he population of the institution has increased to the point where its capacity is taxed to the limit. The demand for additional admissions is steady and will continue." The Board recommended an ambitious expansion program, "[w]ith a view of relieving the congested condition and making suitable provisions for future admissions. FIRST BIENNIAL REPORT OF THE BOARD OF COMMISSIONERS OF STATE INSTITUTIONS TO THE GOVERNOR AND LEGISLATURE OF THE STATE OF NEBRASKA FOR THE BIENNIUM ENDING NOVEMBER 30, 1914, at 9 (1915).

Expanded institutions would be necessary partially as a result of projected population increases for the state. *See id.* They would also be the necessary result, however, of a comprehensive program "submit[ted] for the serious consideration of the Governor and the legislature" of testing and registration which "would unquestionably re-

veal others who are feeble-minded and who *ought not to be returned to society.*" *Id.* at 10.

Observing that "[t]he *only effective measures* to meet these conditions are *segregation and sterilization,*" the Board criticized the then current law: "but in our state neither of these may be applied except as a voluntary proceeding on the part of the legal guardian of the feeble-minded person. . . . It is not a proceeding by which a feeble-minded person may be committed to nor detained in the institution *against the desire* of the parent or guardian." *Id.* at 11. By amending the law, "*the community is enabled to seclude those who cannot safety be allowed to mingle freely with their fellows.* We, therefore, recommend that a statute, similar to those above mentioned, be enacted by this state to provide that admission to the institution for feeble-minded be by order of commitment entered by the county court of the proper county, after due hearing and finding upon a petition filed by the husband, wife, parent, guardian or other person standing in loco parentis to the alleged feeble-minded person, *or* by the superintendents, managers or trustees of any institution having such person in charge, or by the county commissioners, county attorney, superintendent or principal of schools, or a probation officer of the county in which such alleged feeble-minded person shall reside." *Id.* at 11-12.

The legislature responded, enacting an amendment on April 14, 1915, extending the list of people eligible to initiate commitment proceedings to include "the county commissioners, county attorney, any poor law official, any superintendent or principal of schools, or any probation or parole officer of the county of which such idiotic, imbecile or feeble-minded person is a bona fide resident. . . . and the superintendent or managing officer of any public or charitable institution having in charge any idiotic, imbecile or feeble-minded person." 1915 Neb. Laws 294, ch. 131. "[D]etention" was mandated if "it shall appear that the person named in the application is an idiot,

an imbecile or a feeble-minded person and that the best interests of such person *or the welfare of society* require that he be committed to said institution for the feeble-minded." *Id.* at 295."It shall be the duty of said institution to receive all such idiotic, imbecile and feeble-minded persons duly committed thereto and to detain them therein, and to arrest and return any who may escape therefrom." *Id.*

Shortly thereafter, the lawmakers passed "AN ACT to authorize the sterilization of feeble-minded," whose "children would probably become a social menace" and "would be harmful to society." 1915 Neb. Laws 554-55. ch. 237. The act was not approved by the governor, but became operative without his signature.

In 1921, the legislature changed the name of the institution from the "Nebraska Institution for Feeble-minded Youth" to simply the "Nebraska Institution for the Feeble-minded," in recognition of the abandonment of all age restrictions. 1921 Neb. Laws 843, ch. 241, § 1. "The objects of the institution shall be to provide *custodial care* and humane treatment for those who are feeble-minded, *to segregate them from society*, to study to improve their condition, [and] *to classify them*." *Id.*

North Dakota. The Legislative Assembly of North Dakota in 1903 adopted "AN ACT to Establish an Institution for the Feeble Minded," to be "permanently maintained at or near the city of Grafton" for "*all* idiotic and epileptic persons residents of this state." 1903 N.D. Sess. Laws 142, 143, ch. 108, §§ 1, 6. State Superintendent L. B. Baldwin reported that it was "advisable that they be placed in institutions of this character *for life*. A relationship exists between the forms of degeneracy, namely, the criminal, the inebriate, the prostitute and the feeble minded." The view of state officials was that "to protect posterity," it was necessary to undertake "the gathering of this great number of defectives into institutions and colonies." FIRST BIENNIAL REPORT OF THE NORTH DA-

KOTA INSTITUTIONS FOR FEEBLE MINDED AT GRAFTON FOR THE PERIOD ENDING JUNE 30, 1904 TO THE GOVERNOR OF NORTH DAKOTA 9-10 (1904).

In 1909, the Legislative Assembly promoted the permanent segregation of those committed by providing that "any inmate of such institution shall not be removed therefrom," except by written application, and "said request must receive the approval of the superintendent before such inmate can be removed." 1909 N.D. Sess. Laws 317-18, ch. 213, § 1.

In 1913, the legislature provided that "any feeble minded person who is *offensive to the public peace or to good morals, and who is a proper subject for classification and discipline in the institution*, may be committed" without consent. 1913 N.D. Sess. Laws 222, ch. 166, § 1. This provision was enacted as an emergency measure in view of "the fact that there is now no law for compulsory commitment of feeble-minded persons *obnoxious to the peace and good morals of the public.*" *Id.* § 3.

The Legislative Assembly authorized the superintendent to "admit to the institution temporarily, without commitment, under such rules and regulations as the Board of Administration may prescribe, for purposes of observation, such children or adults as are *suspected of being feeble minded or idiotic*, to ascertain whether or not such person is actually mentally defective and a proper case for care, treatment and training in an institution for the feeble-minded." 1921 N.D. Sess. Laws 123, ch. 64.

It was also made "the duty of the superintendent" to "report quarterly to the Board of Examiners herein provided for, all feeble-minded" who were considered as having "potential to producing off-spring, who, because of inheritance of inferior or antisocial traits, *would probably become a social menace. . . .*" 1927 N.D. Sess. Laws 433, ch. 263, § 1. The Board would, following a hearing, "make an order requiring such person to be sterilized." *Id.* at 434, § 3. The purpose of the law was to "*protect society from the menace* of procreation by said inmate." *Id.* § 5.

Ohio. As early as 1857, the General Assembly of Ohio established the "Ohio State Asylum for Idiots." 1857 Ohio Laws 190, 191.

In 1898, Ohio lawmakers established "a custodial department" for the "detention" of "idiotic and feeble-minded children *and adults*," 1898 Ohio Laws 209, § 1, and established an involuntary commitment procedure, *id.* at 211, § 6.

In 1912, Superintendent E. J. Emerick called for increased facilities. "If we could *segregate* these defectives when they are young and *keep them confined during their natural lives*, it would obviate the expense of having them committed repeatedly to our penitentiaries when they grow older. Under our present plan they are sent to our penal institutions for a short term after committing some crime, allowed to go out again, scatter their progeny, and commit other crimes and depredations, only to be recommitted time after time. . . . If we take these children into our institution, brighten them up as best we can, and turn them loose on the public, it has not only been a waste of time, money, and energy, but we have done the world an irreparable injury." Emerick, *The Segregation of the Defective* in PROCEEDINGS OF THE NATIONAL EDUCATION ASSOCIATION, 1912, at 1291-92 (1912). Emerick and others continued the same theme for the next several years. *See* E. J. EMERICK, THE PROBLEM OF THE FEEBLEMINDED (1913); JUVENILE PROTECTIVE ASSOCIATION OF CINCINNATI, THE FEEBLEMINDED, OR, THE HUB TO OUR WHEEL OF VICE (1915); M. SESSIONS, THE FEEBLEMINDED IN OHIO (1918).

In 1919, the legislature established "an additional institution in the state for the *custody, supervision, control*, care, *maintenance*, and training of feeble-minded persons," to receive "feeble-minded persons committed to its custody and care *from any county in the state*." 1919 Ohio Laws 430, § 1.

South Dakota. South Dakota's first facility for the segregation of retarded people was a department of the

Northern Hospital for the Insane established as early as 1893. 1893 S.D. Sess. Laws 169, ch. 101. In 1917, the legislature enacted the state's first sterilization law, making it "the *duty*" of the State Board of Charities and Corrections to order the sterilization of "*any* of said inmates [who] would produce children with *a tendency* to disease, feeble-mindedness, idiocy or imbecility. . . ." 1917 S.D. Sess. Laws 378-379, ch. 236, § 2.

In 1921, the legislature passed an act "RELATING TO THE SEGREGATION OF FEEBLE MINDED." 1921 S.D. Sess. Laws 344, ch. 235. The law created the State Commission for the Control of the Feeble Minded and empowered it "to make all necessary rules and regulations pertaining to the *segregation*, care *and control* of feeble minded persons. . . ." *Id.* §§ 1, 3. It was "the purpose of this act to provide that *all feeble minded persons resident within this state shall become the wards of the state and shall be kept segregated.*" *Id.* § 2. In order to enforce this mandate, the "state commission shall make a survey of all state institutions *and of the state generally* to ascertain the persons whom they believe to be feeble-minded in order that said state commission may make necessary complaints to the county commission." *Id.* at 344-45, § 5. Additionally, "[a]ll teachers" were required to "report *all feeble-minded children coming to their attention* to the state board." *Id.* at 345. This system of outreach efforts to systematically segregate retarded people became known nationwide as the "South Dakota Plan," and became a model for similar efforts in other states. The legislation was deemed by the Commission to "constitute a substantially laid foundation upon which to erect the super-structure of a wise social and economic administration of the feeble-minded problem." STATE OF SOUTH DAKOTA, SECOND BIENNIAL REPORT OF THE COMMISSION FOR SEGREGATION AND CONTROL OF THE FEEBLE-MINDED FOR THE PERIOD ENDING JUNE 30, 1928 TO THE GOVERNOR 2 (1928).

The Commission proposed legislation to require the "identification of all feeble-minded in the state and their registration as a matter of record [,] . . . a continuative census [,] . . . supervision and control by properly constituted authorities [,] . . . [and] the operation of the sterilization law and the anti-marriage law. In fact the law is designed to give *the defective* the protection of the state, and at the same time *to protect the state against his social inadequacy.*" STATE OF SOUTH DAKOTA, THIRD BIENNIAL REPORT OF THE COMMISSION FOR SEGREGATION AND CONTROL OF THE FEEBLE-MINDED FOR THE PERIOD ENDING JUNE 30, 1930 TO THE GOVERNOR 3 (1930). The Commission warned that the proposed legislation was necessary due to the large numbers of "feeble-minded" who were "at large and uncontrolled by the state." *Id.* at 4.

On February 19, 1931, the comprehensive law requested by the Commission was enacted. The term "feeble minded" was broadly and vaguely defined to include "*all individuals*, except the insane, who by reason of mental deficiency are incapable of doing the work of the grades in the public schools *in a reasonable ratio to their years of life; or* who by reason of mental deficiency and other associated defects are incapable of making *the proper adjustments to life* for one of their chronological age." 1931 S.D. Sess. Laws 200, ch. 153, § 1. The Commission drafted into the law its paramount "authority in all matters pertaining to the care, supervision, and control of all feeble-minded persons in the State of South Dakota not confined within the state school and home for the feeble minded. Said commission shall determine the conditions under which such feeble minded persons shall be permitted to remain outside of said institution; and when, and under what conditions, commitment to such institution shall be required." *Id.* § 2. The Commission was given "the duty" to "maintain a continuative census of the feeble minded in the state, and all boards of education, school principals, county superintendents of

schools, city school superintendents, and teachers, are hereby specifically required to give said commission, or its agents, *such access as the commission, or its agents, deem necessary* to all school records, and to *all children* within their control for purposes of examination. . . ." *Id.* § 3(a). Moreover, it was to "be the duty of *all* teachers, city school superintendents and county superintendents of schools" as well as "the duty of *all* doctors, nurses, hospitals, penal and charitable institutions, county welfare boards, public health officers, and public officers, boards, or commissions within the State of South Dakota, to report to the state commission for the control of the feeble minded the name, age, and residence of *all children believed by them to be feeble minded*, and also to furnish whenever requested by the state commission for control of the feeble minded *any and all information* which they may have relative to the name, age, residence and antecedents of any person believed to be feeble minded." *Id.* § 3(b), (c). "Sub-Commissions," were established in each county of the state "under the direct authority of the state commission" with the "specific authority" to "*apprehend, examine, commit, establish guardianships, transport, and maintain the custody* of *any feeble minded person* within their respective counties." *Id.* at 200-01, § 4. "It shall also be the duty of each sub-commission to declare to be feeble minded all of those persons whom the sub-commission, or whom a majority of the members of such sub-commission, find upon investigation and examination to be feeble minded: and forthwith to commit such feeble minded to the supervision and control of the state commission. . . ." *Id.* at 201, § 6.

This legislation, according to the Commission, "would serve the purpose of *securing control and supervision of all the feeble-minded outside of institutions in the State.*" STATE OF SOUTH DAKOTA, FOURTH BIENNIAL REPORT OF THE COMMISSION FOR SEGREGATION AND CONTROL OF THE FEEBLE-MINDED FOR THE PE-

RIOD ENDING JUNE 30, 1932 TO THE GOVERNOR 3 (1932). "[T]he Commission was thoroughly convinced that the *great problem of feeble-mindedness* lay in that large group of feeble-minded *outside of institutions*," who were "scattered throughout the population" and "*in possession of all the rights and liberties of normal people.*" *Id.* The Commission found that most of "the feeble-minded were at large and uncontrolled by the State," *id.*, but that would change: "To have control there must be: 1st, Identification; 2nd, Examination; 3rd, Registration; 4th, Supervision; 5th, Prevention (of marriage); 6th, Sterilization. The new law is designed to fulfill these requirements." *Id.*

Commission personnel "were sent into the various counties and through contact with the schools, welfare boards, health officers, social agencies, physicians, nurses, and public agencies of every kind, sought to *locate every possible feeble-minded individual.*" *Id.* at 9.

Two years later, the Commission reported "the number who have been committed to the State Commission, *those who are segregated in the institution and those who have been sterilized, are now all under State Control.*" STATE OF SOUTH DAKOTA, FIFTH BIENNIAL REPORT OF THE STATE COMMISSION FOR THE CONTROL OF THE FEEBLE-MINDED FOR THE PERIOD ENDING JUNE 30, 1934 TO THE GOVERNOR 5 (1934). The Commission complained, though, that the state's sterilization law was "much too complicated and cumbersome to achieve the best results." *Id.*

The legislature agreed, enacting legislation the following February giving each Sub-Commission, following a hearing, "the power to make an order for the sterilization of any feeble-minded person found within its respective county. . . ." 1935 S.D. Sess. Laws 163, ch. 113, § 1. A petition for sterilization could be "filed with the Chairman of the Sub-Commission of the County in which

the person believed to be feeble-minded is found," by "*any resident* of the County in which such person may be found." *Id.*

The "South Dakota Plan" was in effect in similar form at least through 1968. *See* STATE OF SOUTH DAKOTA. TWENTY-SECOND BIENNIAL REPORT OF THE STATE COMMISSION FOR THE MENTALLY RETARDED FOR THE PERIOD ENDING JUNE 30, 1968 TO THE GOVERNOR (1968).

Wisconsin. Public support in Wisconsin for segregation of retarded people did not begin in earnest until the 1890s. Among those lobbying for the establishment of an institution, through a state-wide petition drive, were the Board of Health, the Federation of Women's Organization, and the State Teachers Association. One such petition, signed by the leading citizens of Washburn County in 1891, called for the building of an institution "for the feeble-minded, who are a constant menace to the good order of society, and to social and domestic safety and tranquility. . . ." *Quoted in* A. RUGG. ONE HUNDRED YEARS OF PUBLIC CARE FOR PEOPLE WITH MENTAL RETARDATION IN WISCONSIN 8 (1983).

Dr. J. H. McBride, a member of the Wisconsin Conference of Charities and Corrections, stated the popular belief that retarded children should be removed from the family: "That an idiot child is, with *its repulsive appearance* and disorderly habits, *a demoralizing association for brothers and sisters*, a thing that would seem to go without saying. Daily experience with the course and rude behavior of an idiot is an experience that must, of necessity, be seriously injuring to young and tender natures." PROCEEDINGS OF THE WISCONSIN CONFERENCE OF CHARITIES AND CORRECTIONS 118 (1890).

In 1895, the legislature established "The Wisconsin Home for feeble-minded." 1895 Wis. Laws 280, ch. 138, § 1. The facility was for "[a]ll feeble-minded, epileptic and idiotic persons, residents of the state." *Id.* at 241, § 4. The law was amended in 1897, to provide that "when-

ever it shall appear that any feeble-minded female of child-bearing age is, by reason of her condition, a menace to society, it is the duty of the supervisor to bring the person before the county judge. . . ." 1897 Wis. Laws, ch. 360, § 1.

In his first biennial report, Superintendent Alfred W. Wilmarth requested of the legislature increased appropriations for additional dormitories in order to "*purge society* and obstruct the increase of feeble-mindedness." WISCONSIN BOARD OF CONTROL. BIENNIAL REPORT 321 (1898). What training that was provided focussed upon "educating the child as a useful member of the *institutional* community *where he will always live.*" WISCONSIN BOARD OF CONTROL. BIENNIAL REPORT 356 (1904). Indeed, Superintendent Wilmarth complained in his report of the "annoyance . . . created by friends of some children who demand their release when they are *entirely unfit to go into general society.*" *Id.* at 376.

By 1912, state officials were reporting that the work of the institution basically "consist[ed] of *separating them from society,* feeding, and clothing them." WISCONSIN BOARD OF CONTROL. BIENNIAL REPORT 20 (1912). That same year, "the Board of Control was directed not to consider 'paroling' anyone who 'might' become a menace to the community." *Id.*

A Visiting Committee of the legislature endorsed the continuation and extension of this approach and, in addition, urged the enactment of a sterilization law because of the "present danger to the race." *Report of the Legislative Visiting Committee,* SENATE JOURNAL 263 (48th Leg. Sess.). In 1913, the legislature authorized the sterilization of residents of the institution for whom it was found "that procreation is inadvisable." 1913 Wis. Laws 972, ch. 693, § 3. The same day, the lawmakers made room for the incarceration of more "feeble-minded" by establishing a second institution. *Id.* at 963, ch. 689, § 1. It was needed since the population of the Home for the Feebleminded increased from 394 to 1060 in the period

1900-1920. WISCONSIN BOARD OF CONTROL. BIENNIAL REPORT 290 (1920).

Southern States

Alabama. On September 29, 1919, the legislature of Alabama established "The Alabama Home" for "mental inferiors." 1919 Ala. Acts 738, No. 568, § 2.

"[D]eclared to be mental inferiors or deficients, or feeble-minded" by the legislature for purposes of confinement at the Home were "[a]ll persons of *whatever age*, who are *deficient or inferior* to the extent of being classed in either of the following groups of the feeble-minded: That is to say, idiots, imbeciles, feeble-minded or morons, and any of whom may be, or may not be epileptics, but not violent or insane."

Id. at 739, § 7. The terms "feeble-minded" and "mental inferior or deficient" were defined in the act to "include every person with such a degree of mental defectiveness from birth, or from an early age that he is unable to care for himself and to manage his affairs with ordinary prudence, *or that he is a menace to the happiness* or safety of himself *or of others in the community*, and requires care, supervision, and control either for his own protection *or for the protection of others.*" *Id.*

The courts were given "the power and authority to commit such person to the Home *notwithstanding* the family or relatives may object thereto." *Id.* at 740, § 9.

The same enactment also instructed the operators of the Alabama Home, that, if "they deem it advisable they are hereby authorized and empowered to sterilize any inmate." *Id.* § 13.

The law provided that "[t]he Superintendent must not grant a parole to any inmate unless he is of the opinion that it will not be detrimental to such inmate *or to society*, and the Superintendent must recall said parole whenever he is satisfied that the welfare of such paroled

inmate, *or of the community to which said inmate is paroled* requires it." *Id.* § 14.

Arkansas. Arkansas' institution "for the Feeble-Minded" was created by an act of the legislature on March 6, 1917. 1917 Ark. Acts 942.

The law broadly defined "feeble-minded" for the purposes of confinement at the institution "to include *all degrees of mental defect* due to arrested or imperfect mental development. Those feeble-minded persons possessing approximate mental development not to exceed that of a normal child of three, shall be classed as 'idiots;' those approximately of the mentality of children from four to seven, inclusive, shall be known as 'imbeciles;' and those approximately with the mental development of normal children from eight to twelve, inclusive, shall be known as 'morons.' " *Id.* § 11.

Florida. In 1919, the Florida Legislature, noting "an alarming state of facts" in a report submitted to it by a committee appointed by the governor (*see* 1915 Fla. Laws 263, ch. 6920), and further noting "[f]rom the findings of the said Committee there can be no doubt that there should be established and created in this State an Institution for the care of Epileptic and Feeble-Minded, where they can be segregated," established the "Florida Farm Colony for Epileptic and Feeble-Minded." 1919 Fla. Laws 231, ch. 7887, preamble & § 1.

The Colony was founded "to the end that these unfortunates may be prevented from reproducing their kind, *and the various communities and the State at Large relieved from the heavy economic and moral losses arising by reason of their existence.*" *Id.* § 8. Its purpose was "for *the segregation*" of the "feeble-minded." *Id.*

Georgia. On August 19, 1919, the General Assembly of Georgia passed "An Act to establish in the State of Georgia an institution to be known as the 'Georgia Training School for Mental Defectives.' " 1919 Ga. Laws 377, No. 373. The institution was ordered built "as soon as

possible" for all "defectives" who "constitute *menaces* to themselves *or the community*." *Id.* § 1.

The statute mandated that "preference in admission shall be given to children and women of child-bearing age," but the institution was open to *any* "defective" who "constitutes *a menace to the happiness* of himself or *of others in the community*" who were "not insane or of unsound mind." *Id.* at 379, § 3.

The institution opened in 1921. A year later, its first superintendent, George H. Preston, M.D., complained that the facility was "not large enough to fulfill the demands made of it." ANNUAL REPORT OF THE GEORGIA TRAINING SCHOOL FOR MENTAL DEFECTIVES, GRACEWOOD GEORGIA 4 (1922). According to the Report, "the fact of primary importance to remember is that a defective child will be a defective adult, and will die a defective. There is not a philosopher's stone to turn the base metals of defect into gold." *Id.*

The Georgia legislature enacted the state's first sterilization law, "for the protection of . . . future generations," in 1937. 1937 Ga. Laws 414, No. 5.

Louisiana. The "State Colony and Training School" was established by the Louisiana legislature in 1918 as "an institution especially provided for the feeble-minded persons of the state of Louisiana." 1918 La. Acts, No. 141, § 1. A "[f]eeble-minded" person was defined as "any person afflicted with mental defectiveness" who "requires supervision, control and care for his own welfare, or for the welfare of others, *or for the welfare of the community*, who is not classifiable as an insane person." *Id.* § 2. "When any person residing in this state shall be supposed to be feeble-minded," and "it is unsafe and dangerous to the welfare of the community for him to be at large without supervision, control, and care, any relative, guardian or conservator *or any reputable citizen of the parish* in which such supposed feeble-minded person resides" was authorized to seek that person's commitment to the state colony. *Id.* § 11. The law required "the guid-

ing and controlling thought of the court throughout the proceedings" to be not only "the welfare of the feebleminded person" but also "the welfare of *the community.*" *Id.* § 15.

Mississippi. On April 3, 1920, the Mississippi Legislature passed "AN ACT to provide for the establishment and maintenance of the Mississippi School and Colony for the Feebleminded . . . [and] to prevent the multiplication of feebleminded criminals and paupers." 1920 Miss. Laws 288, ch. 210. The law included in its definition of "feebleminded" those who "constitute *menaces to the happiness* or safety of themselves *or of other persons in the community,* and require care, supervision and control either for their own protection or for the protection of others." *Id.* §2. The enactment was based upon the legislative finding that "the greatest danger of the feebleminded to the community lies in the frequency of the passing on of mental deficiency from one generation to another, and in the consequent propagation of criminals and paupers." *Id.* at 289. "[A] sufficient acreage of the Rankin County state convict farm" was ordered selected and improved "as soon as practicable" for the establishment of the Mississippi Colony, bearing in mind the desirability of a large tract of land to provide for the growing demands of said institution." *Id.* at 290, §8. The "Plan of the Mississippi Colony" was to provide "the most economical production of shelter, with the necessary distribution of heat, light and food, at the same time securing *the isolation and segregation required.*" *Id.* at 291, §9.

The chancery courts were given jurisdiction over "all cases of legal inquiry in regard to feeblemindedness, including idiocy, imbecility, and the higher grades and varieties of mental inferiority which render the subjects *unfit for citizenship.*" *Id.* at 294, §17. Application for commitment could be made "[a]t any time" by "any relative" to the clerk of the court, "but if the relatives of any feebleminded person shall neglect or refuse to make appli-

cation to the clerk of the chancery court to have him adjudged feebleminded, *and shall permit him to go at large*, the clerk of the chancery court shall, on the application, in writing and under oath, of a citizen of the county in question, issue a summons to the sheriff to summon the alleged feebleminded person and his parent, guardian, or next friend to contest the application." *Id.* An order of commitment was to issue if the court "shall be satisfied that the person is feebleminded, and that for the safety or happiness of the feebleminded himself, *or for the safety or happiness of other persons in the community*, he should be committed to the Mississippi Colony." *Id.* at 297, §23.

The legislature later authorized "the operation of sterilization" to be performed "whenever" the Mississippi Colony's superintendent "shall be of the opinion that it is for the best interests of the patients *and of society* that any inmate of the institution under his care should be sexually sterilized," 1928 Miss. Laws, ch. 294, §1 (emphasis provided), and that the board of trustees of the Colony "shall find that the said inmate" is "feeble minded or epileptic, and by the laws of heredity is the probable potential parent of *socially inadequate offsprings* likewise afflicted, that the said inmate may be sexually sterilized without detriment to his or her general health, and that the welfare of the inmate *and of society* will be promoted by such sterilization." *Id.* at 372, §2.

North Carolina. The General Assembly of North Carolina in 1911 established the "North Carolina School for the Feebleminded" for all persons "idiotic and feebleminded six years of age and upward." 1911 N.C. Sess. Laws 256, ch. 87, §1. The clerk of the county court was authorized to order commitment "[w]henever it is made to appear" that "any person resident in said county" was "a fit subject" for institutionalization. *Id.* at 257, §4. By a 1915 amendment, the General Assembly authorized commitment proceedings for children to be brought by, in addition to a parent or guardian, "third, by a guardian

duly appointed; fourth, by the superintendent of any county home, or by the person having the management of any orphanage, association, charity, society, children's home workers, ministers, teachers, or physicians, or other institutions where children are cared for. Under items third and fourth, *consent of parents, if living, is not required.*" 1915 N.C. Sess. Laws 337-38, ch. 266, §3.

According to state officials, "the aim of the institution" was "to *segregate*" all of "the state's mental defectives." THIRD BIENNIAL REPORT OF THE CASTLE TRAINING SCHOOL, KINSTON, N.C., FOR THE YEARS 1915-1916, at 13 (1916). "[I]f for a period of two or three generations mentally defective men and women were prevented by segregation or sterilization from propagating their kind, mental deficiency would be very materially decreased. . . ." *Id.* at 14.

By 1923, the General Assembly had authorized the commitment of "feeble-minded and mentally defective persons *of any age* when in the judgment of the officer of public welfare and the board of directors of said institution it is deemed advisable." 1923 N.C. Sess. Laws 223, ch. 34, §2.

Under 1929 legislation, the superintendent of the institution was "hereby authorized and directed to have the necessary operation for asexualization or sterilization performed upon *any* mentally defective or feeble-minded inmate or patient thereof, as may be considered best in the interest of the mental, moral, or physical improvement of the patient or inmate, *or for the public good.*" 1929 N.C. Sess. Laws 28, ch. 34, §1.

Oklahoma. The Oklahoma legislature established the "Oklahoma Institution for the Feeble-minded" in 1909, for "*all* imbecile and idiotic persons of whatever state who are not insane." 1909 Okla. Sess. Laws 534-35, 536, ch. 34, art. 2, §§1, 4. Application for a commitment could be made by the father or mother, or: "Third: By a guardian duly appointed. Fourth: By the superintendent of any county alms house. Fifth: By the persons having

the management of any institution or asylum where children are cared for. Sixth: By the trustees of any township in Oklahoma. Under the items 'Three,' 'Four,' 'Five,' and 'Six' above, *the consent of parents is not required.*" *Id.* at 538, §8.

In 1931, the legislature authorized the superintendent of the institution to sterilize those "afflicted with" such conditions as "idiocy" or "imbecility." 1931 Okla. Sess. Laws 80, ch. 26, art 3.

South Carolina. On February 12, 1918, the General Assembly of South Carolina passed "AN ACT to Establish the State Training School for the Feeble-minded, and to Provide for Its Government and Maintenance." 1918 S.C. Acts 729, No. 398. Once the facility was built, the "Board of Regents shall notify the Governor, who shall thereupon by proclamation, declare the said Training School for the Feeble-minded ready to receive patients." *Id.* at 731, § 9.

The term "feeble-minded persons" was defined to mean "any moron, imbecile or idiotic person, of whatever grade, who is afflicted with mental defectiveness from birth or from an early age, so pronounced that he is incapable of competing on equal terms with his normal fellows or of managing himself or his affairs with ordinary prudence, and who, therefore, required custodial care and training for his own protection and for the welfare of others *and of the Community*, but who is not insane or of unsound mind. . . ." *Id.* at 731-32, § 10.

Institutionalization proceedings could be initiated by "any reputable citizen of this State" by filing "a petition in writing, setting forth that the person therein named is feeble-minded" and that it was "unsafe or dangerous to the welfare of the community for such person to be at large. . . ." *Id.* at 733, § 13.

State officials reported candidly to the General Assembly that the name of the facility was a misnomer since they "continue to forego" the provision of any "training of mental defectives" but "devote our efforts *mainly to seg-*

regating and giving physical care to as large a number as possible. . . ." FIFTH ANNUAL REPORT OF THE STATE TRAINING SCHOOL FOR THE FEEBLEMINDED. CLINTON. S.C., 1922, at 3 (1923).

As stated by Dr. B. O. Whitten, the Superintendent of the institution, "[i]n almost every instance the propagation of this element of society results in grief and disappointment to the persons in question and will scarcely ever operate in any way which can be expected to promote happiness *or even Anglo Saxon liberty*." SIXTH ANNUAL REPORT OF THE STATE TRAINING SCHOOL FOR THE FEEBLEMINDED. CLINTON. S.C., 1923, at 12 (1924).

In 1935, the legislature authorized the "sterilization of mental defectives." 1935 S.C. Acts 428, No. 304.

Tennessee. On April 14, 1919, the General Assembly of Tennessee passed "An Act to provide for the protection, care, *control, oversight, custody, maintenance* and training of feeble-minded persons; to define who are feeble-minded within the meaning of this Act; and for the establishment, construction and maintenance of the Tennessee Home and Training School for Feeble-Minded Persons." 1919 Tenn. Pub. Acts 561, ch. 150. The Act applied to "any person with such a degree of mental defectiveness" as to be "a *menace to the happiness* or safety of himself *or of others in the community*" who "comprise those commonly called idiots, imbeciles, and morons or high-grade feeble-minded persons" and who "may or may not be subject to epileptic seizures." *Id.* § 2.

"Any relative of a feeble-minded person may make application to have the person so adjudged; but if the relatives and friends of any feeble-minded person shall neglect or refuse to place him or her in the Tennessee Home and Training School for Feeble-Minded Persons, or in a private institution for the feeble-minded, and shall permit him or her *to go at large*, then *any reputable person* being a resident of the county in which such feeble-minded person is found may make application for com-

mitment in writing and under oath to any one of the courts of his county, as above mentioned and shall not be subject to exception or demurrer for defects of form." *Id.* at 564, § 4. It was "the *special duty* of every county health officer and of every County Superintendent of Education in the State to file application for the commitment of feeble-minded persons whose parents or guardians neglect such duty . . . whenever such officer shall have reasonable cause to believe that such commitment is necessary to secure the welfare of such feeble-minded persons *or of those persons with whom they come in contact.*" *Id.* § 5.

State officials acknowledged the legislation as a necessary enactment since "[o]f course, all will agree that there are very many feeble-minded in the State of Tennessee who have never gotten into one of the State institutions and are more or less a *menace and burden* to their respective communities." 1 Q. REP. ST. INSTITUTIONS 30-31 (1919).

Texas. Texas became the first southern state to segregate its retarded citizens when it opened in 1904 a special unit of the State Epileptic Colony, for "idiotic, imbecilic, and feeble-minded epileptics." Gaver, *Mental Retardation*, in MENTAL ILLNESS AND MENTAL RETARDATION: THE HISTORY OF STATE CARE IN TEXAS 20, 22 (1976).

In 1912, the Texas Conference on Charities and Corrections, which had been organized the previous year, presented in the last address of its annual conference a call by Professor Bird T. Baldwin of the University of Texas for an institution for the state's "mental defectives, who are *contaminating society by their presence*, absorbing time and thought that should be devoted to normal children, and later filling the almshouses, charitable institutions, and prisons with illegitimate and irresponsible offspring." Baldwin, *The Causes, Prevention and Care of Feeble-Minded Children*, in PROCEEDINGS OF THE STATE CONFERENCE OF CHARITIES AND CORRECTIONS AT ITS

SECOND ANNUAL MEETING HELD AT WACO, APRIL 14-16, 1912, at 86 (1912). According to Professor Baldwin, these "mental defectives or feeble-minded, who are *by-products of unfinished humanity, belong in an institution* where they may be cared for, made happy, and to some extent useful. They should be *segregated and not allowed to go to our schools with normal children* and should not be permitted to have offspring." *Id.* at 87-88.

The following year, the legislature heeded the call by enacting a bill establishing an institution for the "feeble-minded," but it was vetoed by the governor, apparently on budgetary grounds. This prompted a more concerted effort, again led by the State Conference on Charities and Corrections. Dr. C. S. Yoakum, Secretary of the State Conference, wrote a 156-page monograph calling for the enactment of this legislation. C. S. YOAKUM, CARE OF THE FEEBLE-MINDED AND INSANE IN TEXAS, BULL. U. TEX., NO. 369 (Humanistic Ser. No. 16, Nov. 5, 1914). The monograph called for the removal of "defectives" from the family since "[i]n a home where there is one feeble-minded child among a number of children, we have the definite effects of such communication. To be sure, we recognize the increase in sympathetic understanding that children and parents exercise toward such feeble-minded children; but these moral and social traits are infrequently developed and far overbalanced by the amount of time and energy required to care for such a child, especially if he be of the low grade imbecile or idiotic type. One writer states that we may figure without error that the time of one adult is needed for the care of every feeble-minded or low grade imbecile child or adult. In a custodial institution five of these defective children or adults may be cared for by a single attendant in a much better manner and with much better results than in the home. We are, then, by sending such children to institutions provided for their care, relieving four out of every five of the normal adults now busied in caring for such

defectives, for the economic and business life of the normal community." *Id.* at 44-45. Moreover, "[i]t is certain that the feeble-minded girl and boy are often the bearers of many of the social diseases, and it is especially true that feeble-minded girls are, in the large majority of cases, the inmates of our houses of prostitution." Thus, "the effect *upon the community* of the single individual of this type is bad in the extreme in so far as the social, economic, and moral ideals of that community are concerned." *Id.* at 45, 46.

According to Professor Yoakum, "[t]he only safe procedure is custodial and institutional care *throughout life* for the great majority. . . . Sterilization laws and other means of prevention must for years to come be secondary to this solution of the problem. *Id.* at 66.

The monograph set forth an extensive comparison of the various remedies to the "problem." "Restrictive marriage laws and customs are important, and educative, but fail to reach the irresponsible and degenerate till too late. The 'socially inadequate' are so named just because they are without the influence of law and order. Eugenic education, better environment, and systems of matings purporting to remove defective traits do not affect the impure blood and inheritable factors with the surety necessary to eliminate defects. Laissez-faire or natural selection, euthanasia, neo-malthusianism, and polygamy are either impossible under the protective forces of modern social conditions or are ideas repugnant to present-day ideals of religion and humanity." Of all the solutions, "[t]he evidence so far collected points toward *segregation* [emphasis in the original] as the most feasible, most easily put into force, and least subversive of constitutional prerogative." *Id.* at 82.

Yoakum quoted a report prepared by his parent organization to demonstrate the folly of the early approach taken by schools in the East: "A word to the West! . . . New States and communities should equip themselves properly to attack these problems, and should make their

plans on the basis of *complete control*. Had the States of the East followed this method during the last fifty years their burdens would be only a fraction as great as they now are." *Id.* at 17, *quoting* REPORT OF THE COMMITTEE ON PUBLIC SUPERVISION AND ADMINISTRATION TO THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTIONS, SEATTLE, 1913, at 194 (1913). The bulletin concluded by stressing "the necessity for custodial care and oversight for *all* feeble-minded," through the enactment of legislation to "open[] the door of the institution to all feeble-minded of the State. . . ." *Id.* at 80, 83.

The State Conference meeting in San Antonio in November, 1914, presented additional papers. One concluded that "idiots" have "no economic value, and their care can only remain so much of *a dead load upon society*, whether cared for in a home or in an institution. They are, however, less expense in an institution than in the home, poor farm or asylum." Kelley, *The Colony Plan for the Care of the Feeble-Minded*, 2 BULL. TEX. ST. CONF. CHARITIES & CORRECTIONS 57, 48 (1915). Another concluded that "[f]or the actual idiot there is, or should be, no question as to procedure. The disease indicates its own remedy. The next legislature should make an appropriation for a permanent institution, in which these its most unfortunate citizens could be *permanently segregated*." Smith, *The Feeble-Minded Girls in the Virginia K. Johnson Home*, in *id.* at 61, 62.

Four months later, state representatives Ice Berg Reeves and D. S. McMillan had no difficulty convincing the legislature to reenact their H. B. No. 73, "An Act to provide for the establishment and maintenance of a State Farm Colony for the feeble-minded." 1915 Tex. Gen. Laws 143, ch. 90. With Governor Jim Ferguson's signature on the bill on March 22, 1915, Texas provided for "custodial care" for *all* of "the feeble minded of the State" to the end that these unfortunates may be prevented from reproducing their kind *and society relieved of the heavy economic and moral losses arising from the existence at*

large of these unfortunate persons." *Id.* §§ 1, 2. The colony opened on October 31, 1917. Gaver, *supra* at 24.

State officials, led by Superintendent J. W. Bradfield, urged the legislature to make it easier to populate the institution: "The female can, under the faulty labor conditions of today, make a living for a while, but she is, as a rule, quite unmoral, and makes no effort to protect herself. Her children, usually illegitimate, must, as degenerates, criminals, or defectives, eventually become wards of the State. The male moron is also a potential criminal, and is the class from which inmates for our jails and reformatories are recruited. *Their segregation and control, through life, is the remedy.* This can be obtained only by legally committing them to *an institution where they can be kept permanently.*" In order to resolve this "most serious problem," he "urge[d] the enactment of an ade quate commitment law." Bradfield, *Report of Superintendent, State Colony for Feebleminded*, in FIRST ANNUAL REPORT OF THE STATE BOARD OF CONTROL TO THE GOVERNOR AND THE LEGISLATURE OF THE STATE OF TEXAS, FISCAL YEAR ENDING AUGUST 31, 1920, at 147 (1921).

The legislature responded favorably, enacting, by a unanimous vote, an act establishing a special "court for the feeble-minded" in each county. 1923 Tex. Gen. Laws 172, ch. 82, § 1. Authority was given to "*[a]ny* person who is a resident of the county having knowledge of a person in his county who appears to be feebleminded" to petition to institutionalize that person. *Id.* § 2. "It shall be sufficient, if the affidavit shall be upon information and belief." *Id.* at 173. A hearing would then be scheduled by the court's issuance of an order "to show cause, if any, why such person should not be declared by said court to be feebleminded. . . ." That order also was deemed to "be sufficient authority to the sheriff or any constable of the county to bring such feebleminded person before the court for such hearing." *Id.* § 3. A jury could be demanded. *Id.* § 1. The finder of fact then "shall investigate

the facts and ascertain whether such alleged feebleminded person is such." *Id.* § 4. "If it be found by the court or jury that the alleged feebleminded person is such, the court shall enter its order so adjudging him, and that he be committed to the custody of the State Coloney [*sic*] for the Feebleminded," *id.* § 5, and "[a]ll persons heretofore or hereafter committed or admitted to such institution shall *remain in its custody as permanent ward of the State* until released by the management thereof," *id.* at 174, § 6.

As a result of the state's encouragement, the "demand for entrance into this institution . . . steadily continue[d] over our accommodations." THIRD REPORT OF THE STATE BOARD OF CONTROL TO THE GOVERNOR AND THE LEGISLATURE OF TEXAS, COVERING PERIOD FROM SEPTEMBER 1, 1924, TO AUGUST 31, 1926, at 9 (1927). According to Superintendent Bradfield "[t]his period has been marked by considerable growth of the institution, and we feel that we are now much better prepared to be of real service to the State. . . . These additions represent a healthy growth and encourage us in the belief that proper provision for the feeble-minded of the State is now being recognized as an absolute necessity." Bradfield, *Superintendent's Report*, in *id.* at 137, 138. In the same report, the Board of Control reported candidly that "[t]his institution is, of course, purely custodial. . . ." *Id.* at 9.

Virginia. On March 20, 1914, the General Assembly of Virginia enacted a law directing the State Board of Charities and Corrections to "investigat[e] . . . the question of the weak-minded in the State, other than insane and epileptic, and to report to the General Assembly of nineteen hundred and sixteen a comprehensive, practical scheme for the training, *segregation* and the prevention of the procreation of *mental defectives*." 1914 Va. Acts 242, ch. 147, § 1. Under the direction of its chairman, S. C. Hatcher, the Board published in 1915 a 128-page compilation of studies, recommendations, and pro-

posed legislation under the title of THE MENTAL DEFECTIVES IN VIRGINIA: A SPECIAL REPORT OF THE STATE BOARD OF CHARITIES AND CORRECTIONS TO THE GENERAL ASSEMBLY OF NINETEEN SIXTEEN ON WEAK-MINDEDNESS IN THE STATE OF VIRGINIA TOGETHER WITH A PLAN FOR TRAINING, SEGREGATION AND PREVENTION OF THE PROCREATION OF THE FEEBLE-MINDED.

A letter of transmittal from Chairman Hatcher to Governor Henry Carter Stuart accompanying the report stated that "the corrupt fruits of mental *degeneracy in any community* will disappear in proportion to the reduction of feeble-mindedness in that community . . . the *most urgent need* in the work of reducing degeneracy is the elimination of the feeble-minded." *Id.* at 5. Quoting approvingly eugenicist C. B. Davenport, Chairman Hatcher recommended that " '[i]f *the State were to segregate its feeble-minded, were to examine for mental defects all immigrants settling in its borders*, and were to deport those found to be defective, there will be a constantly diminishing attendance at State institutions for the feeble-minded, and at the end of thirty years there would be practically no use for such institutions.' " *Id.*

The official report detailed numerous "case studies" to support its recommendations. For example, one such "feeble-minded" case "with certain facial lines make one feel that he is *not far removed from the brute*, and is perhaps cruel with the unconscious cruelty of *an animal.*" *Id.* at 20. Another case "ha[d] not even the glimmerings of intelligence manifested by some of the lower forms of *animal life.*" *Id.* at 41. Another had a wife who was already committed "in a suitable institution, but it seems a pity that the man, who is lower grade mentally than his wife, though not so much of a menace, cannot be *segregated instead of being allowed to run at large*. A larger and more adequate colony would remedy this." Noting that "the civilized nations of the earth are awakened to the menace of feeble-mindedness, and are taking

steps for the elimination and prevention of this evil, the report stated "that the principal things to be sought are *identification* and *control*, with *the object finally of elimination;* and so we will have to rely largely on *segregation* and education for the prevention of feeble-mindedness." *Id.* at 17. "[T]he main idea is to keep them healthy, happy, and out of mischief. [W]e must take our mental defectives back to the soil to get the best results." The report recommended that "the State should have authority *to segregate and to detain* mentally defective persons under proper conditions and limitations. This is in the nature of *an indeterminate sentence*, and is at the basis of the law which provides that the superintendent of the Virginia Colony for the Feeble-minded shall have authority to hold mentally defective persons *as long as he pleases*, and discharge such persons when he pleases. . . ." *Id.* at 114. In terms of those "at large," the State Board proposed that it "be empowered" to "have charge of the registration of the mentally defective persons of the Commonwealth" and to "have supervision of the care of such persons pending admission to institutions." *Id.* Additionally, "whenever, in the opinion of the said Board and the Division Superintendent of Schools, a child has proven to be a mental defective, the said Board should have authority, in its discretion, to transfer such child to the State School for the Feeble-minded." *Id.* at 117.

The General Assembly responded positively to the report, enacting the following March "An ACT to define feeble-mindedness and to provide for the examination, legal commitment, and *the custody and care of feeble-minded persons, and their segregation* in institutions." 1916 Va. Acts 662, ch. 388.

In 1924, the General Assembly passed "An ACT to provide for the sexual sterilization of inmates of State institutions." 1924 Va. Acts 569, ch. 394. This law, the constitutionality of which was upheld by the Supreme Court in *Buck v. Bell*, 274 U.S. 200 (1927), provided that

"whenever the superintendent" of "the State Colony for Epileptics and Feeble-Minded, shall be of opinion that it is *for the best interests* of the patients *and of society* that *any* inmate of the institution under his care should be sexually sterilized, such superintendent is hereby authorized to perform, or cause to be performed by some capable physician or surgeon, the operation of sterilization on any such patient confined in such institution afflicted with hereditary forms of insanity that are recurrent, idiocy, imbecility, feeble-mindedness or epilepsy." 1924 Va. Acts 569, § 1. The law was enacted, in part, for "the welfare *of society*." *Id.* (preamble). The law provided for an appeal to a special board, but such appeal was to be dismissed if it be found that the "feeble-minded" resident was "the probable potential parent of *socially inadequate offspring* likewise afflicted" and that "the welfare of the inmate *and of society* will be promoted by such sterilization. . . ." *Id.* at 570, § 2.

West Virginia. In 1917, Governor Henry D. Hatfield first called for the erection of "an institution" which would "provide for the *detention* and care of many feebleminded persons now at large and would assist in solving the problem in this state in preventing the multiplication of such class." *Second Biennial Message of Governor H. D. Hatfield to the Legislature* (1917) in STATE PAPERS AND PUBLIC ADDRESSES OF HENRY D. HATFIELD 77 (n.d.)

"If such an institution should be authorized by the legislature, lands should be purchased to the extent of 500 acres upon which the institution should be erected. This would result in the institution becoming nearly self-supporting because of the fact that practically all of the inmates are able bodied and could perform any ordinary labor under competent supervision." *Id.* at 76-77.

In 1921, the Legislature of West Virginia created for "mental defectives" a state institution to be known as the "West Virginia Training School," for "any person" who "because of mental defect *is a menace to the happiness and welfare* of himself or herself *or of others in the com-*

munity, and therefore requires care, training or control for the protection of himself or herself or of others, and yet who is not insane. This type of persons, commonly classed as feeble-minded, including idiots, imbeciles and morons, shall be known and designated as mental defectives for the purposes of this act. Should the school at any time not be able to accommodate all persons of such class offered for admission, preference in admission shall be given to children and women of child-bearing age." 1921 W. Va. Acts 479-80, ch. 131, §§ 1, 3. "Any relative of a person affected may make application, by complaint under oath, to have the person adjudged a mental defective: *but when the relatives of a mentally defective person either neglect or refuse to place said person* in said school, or in some private institution of a like nature, and shall *permit him or her to go at large*, then *any reputable citizen* of the county may, by complaint under oath, make application to the mental hygiene commission for such commitment. . . ." *Id.* at 480, § 4(a).

The same law empowered the "medical staff" at the institution "to administer such medical treatment and perform such surgical operations for the inmates therein as may be necessary and expedient for the cure and prevention of mental defectiveness or disease." *Id.* at 482, § 5.

Western States

Alaska. Alaska's population was insufficient to justify a separate institution for retarded people in that state. In the territorial days, Congress authorized their commitment temporarily to the detention hospitals at Nome and Fairbanks until they could be transferred permanently to institutions in other states. *See* Pub. L. No. 216, § 7, 35 Stat. 601 (1909); Pub. L. No. 306, ch. 424, § 1, 36 Stat. 352 (1910).

Arizona. On April 20, 1927, the Legislature of Arizona established an institution for "mentally defective

children in the State of Arizona, which shall be known as the Arizona Children's Colony." 1927 Ariz. Sess. Laws 367, ch. 96, § 1. Such "defectives," the law mandated, "if not insane, *shall be held* and be determined to be mentally deficient, and be entitled to enter said colony." *Id.* at 369, § 10. Included among the considerations for determining mental deficiency was that the resident "require supervision, control, care and education, for their own welfare, or for the welfare of others, *or for the welfare of the community.*" *Id.* at 370, § 10(a).

California. On March 9, 1887, California became the first state to provide for the segregation, "for life," of "imbecile or feeble-minded" people. 1887 Cal. Stats. 69, ch. 57. The original funding for the facility, located in Santa Clara, had been authorized two years earlier. 1885 Cal. States. 198, ch. 156.

Because the state promoted segregation, the Santa Clara home grew quickly. By 1889, the institution was admitting not only severely retarded people, but also "cases well calculated to deceive the most observing." SONOMA STATE HOME, THE INSTITUTION BULLETIN (1910). Larger accommodations were soon needed. Therefore, on March 6, 1889, the state legislature appropriated $170,000 to purchase land and "to erect proper and substantial buildings . . . upon said site." 1889 Cal. Stats. 69, ch. 75. The state purchased 1660 acres of land in a remote area near Eldridge in Sonoma County. By 1891 buildings were constructed and on November 24 of that year the residents were moved from Santa Clara. STATE BOARD OF CHARITIES AND CORRECTIONS, FIRST BIENNIAL REPORT 62 (1905).

State officials praised this development, noting that the "special province of the Home for the Feeble-Minded is to deal with the incipient aberration of the mental processes—striking at the cause. . . . This institution would *remove from society* the cause, so far as possible to do so." CALIFORNIA HOME FOR THE FEEBLE-MINDED, SIXTH ANNUAL REPORT 30-31 (1890). Indeed, there was

a felt need to track down the "very large class of those unfortunates for whom no application for admission into this institution has been made." *Id.* at 29.

On March 31, 1897, a law was passed amending the 1885 statute that had restricted admissions to those "feeble-minded children between the ages of 5 and 18 years . . . who are incapable of receiving instruction in the common schools." 1885 Cal. Stats. 198, ch. 156, § 8. Under the new law, the institution was "direct[ed] to admit" not only "idiots" but also "epileptics and mentally enfeebled paralytics . . . *irrespective of age*, as the accommodations of the home may permit, and as may, in the judgment of the management, appear suitable subjects for such admission." 1897 Cal. Stats. 251, ch. 188.

In its *First Biennial Report*, the newly created State Board of Charities and Corrections stated: "There are several reasons why the feeble-minded should be cared for in Homes of this sort. Their presence in the community at large is apt to be very detrimental to normal children, and when they come to the adolescent age the danger of reproduction in kind is very great and should, if possible, be prevented." FIRST BIENNIAL REPORT, *supra* at 41.

By the time of its Third Biennial Report, the State Board was stating unequivocally that there were "now in county hospitals, in orphan asylums, and other institutions, and *even in homes*, children who could be much better cared for in the State Home for the Feeble-Minded. Such a child is generally a *menace to the institution, the family, or the community in which he is*. It is desirable in every way to accept into the Home these children, as to *keep those who are now there*." STATE BOARD OF CHARITIES AND CORRECTIONS, THIRD BIENNIAL REPORT 73 (1908).

In 1909, the California legislature became the second in the nation to vote into law "an act to permit asexualization of inmates of . . . the California Home." 1909 Cal. Stats. ch. 720.

This law was progressively extended to cover more individuals by amendments of 1913 and 1917. The 1913 measure specified that sterilization could be performed "with or without the consent of the patient." 1913 Cal. Stats. ch. 363. The 1917 act extended the procedure to all persons deemed to suffer from "marked departures from normal mentality." 1917 Cal. Stats. ch. 489.

State officials also kept constant pressure on the legislature to provide increased appropriations to segregate more and more retarded persons, linking retardation with the immigration of "defectives." In 1915, an act was passed authorizing a legislative committee to investigate the necessity for a second mental retardation institution in the state. 1915 Cal. Stats. 1139, ch. 729. That committee found: "So fundamental is this problem of the feeble-minded that one can assert without fear of successful contradiction that if all the time, money and effort now devoted to the solution of all of our social problems were concentrated for the next ten years on the question of feeble-mindedness, there is not a social problem that would not be nearer its solution at the end of ten years than it will be under the present plan. The first step is to provide state colonies." LEGISLATIVE COMMITTEE ON MENTAL DEFICIENCY, REPORT ON MENTAL DEFICIENCY 22 (1917). The Committee further found, "[i]n considering the advantages of creating such an institution for the proper care of the mentally defective as unfortunate individuals, there is also to be remembered the benefit to society of thus being relieved of the menace of their unsocial conduct." *Id.* at 65. The Committee also recommended legislation "creating a new institution for feeble-minded and epileptic persons, to be located in Southern California." *Id.* at 63.

In the meantime, the State Board commissioned a series of "surveys in mental deviation" to bolster its case for another institution. Based upon the surveys it had commissioned, the Board reported a firm "*relation between race and mental deficiency.*" STATE BOARD OF

CHARITIES AND CORRECTIONS. EIGHTH BIENNIAL REPORT 51 (1918). One of the surveys, focusing upon the Merced County public schools, found that 4.24% of the students were "feebleminded." CALIFORNIA BOARD OF CHARITIES AND CORRECTIONS. REPORT OF THE STATE JOINT COMMITTEE ON DEFECTIVES IN CALIFORNIA 27 (1918). This high number was explained by the fact that the county surveyed "possess[ed] *an exceptionally high proportion of foreign-born* in its population." *Id.* Since "of those found feeble-minded, 75.7% had foreign born parents," it was "evident, therefore, that *most of the feeblemindedness in this country is due to the immigration of undesirable types.*" *Id.* at 35. Referring specifically to greater retardation it found among Mexicans and Portuguese, the report expressed "no wonder that these nationalities are present in the reform schools and state prisons in far greater proportions than their numbers in the state would seem to warrant." *Id.* at 35-36.

The survey found "the *ratio of feeble-mindedness was far higher among Mexicans, Negroes, and recent immigrants from Europe than among those of native American stock*," and concluded that "*California has drawn a large proportion of immigrants of an undesirable type.*" *Id.* at 13-14, 19.

Referring to the survey of the Merced schools, the report found that the "hopelessly feeble-minded should be removed from the public schools and placed under *permanent custodial care.*" *Id.* at 45.

The report "estimated the annual cost of feeble-mindedness in the State of California at $5,000,000" including "relief for indigent and dependent defectives, expenditures for court proceedings and probation work for feeble-minded delinquents, depredations committed by defective delinquents, expense to the state of feeble-minded individuals in the prisons . . . and finally the money which is worse than wasted in the futile attempt to educate feeble-minded children. . . . We have not included in these estimates the losses accruing from

vocational unfitness, alcoholism, venereal disease, and prostitution among the defective population. It would not be surprising if these losses, although less tangible and altogether impossible to estimate accurately, were as great as all the other losses combined." *Id.* at 42.

The report noted the state's "awakening to the menace of the feeble-minded" as one of the most noteworthy movements of present public thought," *id.* at 5, and concluded that "[a]ll of the findings of this study emphasize the *necessity of bringing a larger proportion of our defectives under social surveillance and restraint*," *id.* at 19. Lamenting the fact that "California has but one state institution for the care of the feeble-minded," and arguing for the "*permanent segregation* of all feeble-minded individuals" and to "extinguish the defective strains which now encumber our prisons, reform schools, jails, courts, and public schools," the report urged as the "first step in this direction" the appropriation of funds for "the establishment of an additional state home for the feeble-minded." *Id.* at 51, 43.

The legislature in 1919 appropriated $100,000, 1919 Cal. Stats. 1214, ch. 562, and, in 1921, $120,000, 1921 Cal. Stats. ch. 445, for the construction of buildings at the "Pacific Colony." The facility opened on March 20, 1921. FIRST BIENNIAL REPORT OF THE DEPARTMENT OF INSTITUTIONS OF THE STATE OF CALIFORNIA 68 (1922).

In 1915, the legislature amended the law permitting the institutionalization of any "imbecile or feeble-minded person or any idiot" to the Sonoma State Home. The amendment added a proviso that, in addition to a parent or guardian, "any peace officer may petition said court for an order admitting such a person to such hospital." 1915 Cal. Stats. 1262, ch. 638.

State officials stated that the new law would "make it possible to secure the commitment of children who need institutional care but *whose parents or guardians are averse to such action*." STATE BOARD OF CHARITIES AND CORRECTIONS. BIENNIAL REPORT 30 (1916).

Colorado. On May 5, 1909, the General Assembly of Colorado established that state's institution "for mental defectives." 1909 Colo. Sess. Laws 180, ch. 71. The institution was opened on July 1, 1912, and its purpose from the outset was the "*segregation*, in an institution, for life," of the "defectives." FIRST BIENNIAL REPORT OF THE BOARD OF COMMISSIONERS AND SUPERINTENDENT OF THE COLORADO STATE HOME AND TRAINING SCHOOL FOR MENTAL DEFECTIVES, 1911-1912, at 5 (1912).

The program instituted by Colorado officials to enforce the state's new law was summarized in its *Second Biennial Report:* "The law of Colorado requires the legal commitment of all inmates to the State Home and Training School for Mental Defectives. This gives the management the control regarding the question of removal or discharge, and, in a limited sense, enables the institution *to prevent this class of persons from coming in contact with the populace*. It is impossible to restore feeble-minded persons to a normal condition, and by reason of this fact *they should be kept in an institution indefinitely*, and not be permitted to marry and perpetuate their kind. In years gone by, institutions for this class of persons took some pride in graduating as many as possible, and would turn them *loose in the world* to multiply; but this error is being corrected, as far as possible, by *holding them indefinitely* in institutions provided for their care and training." SECOND BIENNIAL REPORT OF THE BOARD OF COMMISSIONERS AND SUPERINTENDENT OF THE COLORADO STATE HOME AND TRAINING SCHOOL FOR MENTAL DEFECTIVES, 1913-1914, at 4-5 (1914).

By then, a peonage system had been established: "Many of the boys work on the farm and in the garden, in the laundry and in the kitchen. Girls and boys alike assist in making beds, sweeping, scrubbing floors, washing dishes, setting tables, and doing all kinds of housework. Some are capable of driving teams and can handle the hay-stacker quite skillfully. As the institution grows older, and more buildings are provided, and the popula-

tion increases, there will be enough boys who will become skilled by teaching and training to make the institution in a measure self-supporting." SECOND BIENNIAL REPORT OF THE BOARD OF COMMISSIONERS AND SUPERINTENDENT OF THE COLORADO STATE HOME AND TRAINING SCHOOL FOR MENTAL DEFECTIVES, 1913-1914, at 5 (1914).

Hawaii. On April 19, 1919, the Legislature of the Territory of Hawaii passed "AN ACT Providing for the Establishment and Maintenance of a Home for Feeble-Minded Persons." 1919 Haw. Sess. Laws 137, Act 102. The law specified custody, "said home [to be] conducted on the 'farm colony' plan." *Id.* § 2. The Home was open to all Hawaiians requiring institutionalization "for their own welfare, for the welfare of others, *or for the welfare of the community.*" *Id.* at 138, § 4.

The institution was "considered merely a place to get the feeble-minded out of the community. . . ." DEPARTMENT OF INSTITUTIONS, TERRITORY OF HAWAII, THE FIRST TEN YEARS, 1939 THROUGH 1949, at 37 (1949).

Idaho. The "Idaho State Sanitarium" for "the feeble-minded" was established in 1911 by enactment of the Legislature of Idaho. 1911 Idaho Sess. Laws 86, ch. 41. Upon a finding that a person was "feeble-minded," according to the state, a judge "must issue and deliver to some peace officer for service a warrant directing that such person be arrested and taken before any Judge of a Court of record within the county for examination." *Id.* at 94, § 33.

In 1921, it was explicitly mandated that the institution be used for confinement of those "mentally defective from birth and not insane, *irrespective of age*, who are legal residents of the state, and *who are from a social standpoint dangerous to be at large and a menace to society.*" 1921 Idaho Sess. Laws 326, ch. 139, § 1.

To assist in the elimination of this "menace," the legislature adopted "AN ACT TO CREATE A STATE BOARD OF EUGENICS; TO PROVIDE FOR THE

STERILIZATION OF ALL FEEBLE-MINDED . . . WHO ARE A MENACE TO SOCIETY." 1925 Idaho Sess. Laws 358, ch. 194. The law "declared the duty" of the superintendent of the Idaho State Sanitarium to register with the new Board of Eugenics "all persons, male or female, who are feebleminded . . . who are, or in their opinion are likely to become, a menace to society." *Id.* at 359, § 2."[I]f in the judgment of a majority of said Board procreation by such person would produce a child or children having an inherited tendency to feeble-mindedness . . . or who would probably become a social menace or ward of the State, and there is no probability that the condition of such person so investigated and examined will improve to such an extent as to avoid such consequences, then it shall be the duty of such Board to make an order embodying its conclusions with reference to such a person in said respects and specifying such a type of sterilization as may be deemed by said Board best suited to the condition of said person and most likely to produce the beneficial results in the respects specified in this section." *Id.* One of the "objects to be sought" by this chapter was "to protect society from the acts of such person, or from the menace of procreation by such person." *Id.*

Montana. On March 4, 1919, the Legislative Assembly of Montana passed "An Act Relating to the Admission, Care and Retention of Feeble-Minded Persons."1919 Mont. Laws 196, ch. 102. The law established the "Montana Training School for Feeble-Minded Persons" for the "*detention*" of "feeble-minded minors and adults." *Id.* § 1. The law also provided that "*no inmate may be removed from said institution, permanently or temporarily,* except upon a written order of the superintendent or upon an order of any District Court of the state and the provisions of this Section shall apply to adults as well as to the minors therein. The costs of such court action to be borne by the party bringing the action." *Id.* at 198, § 9.

Four years later, the lawmakers authorized surgery that would "surely and permanently nullify the power to procreate offspring, to achieve permanent sexual sterility" of the "feebleminded." 1923 Mont. Laws 535, ch. 164, § 2(e), with the purpose of "protect[ing] society from the menace of procreation by said inmate," *id.* at 537, § 8.

Nevada. Nevada, like Alaska, did not have sufficient population to support its own institution. For this reason, the legislature authorized state officials "to make arrangements with the director of any institution for the feebleminded in California, or Utah, or other states" for Nevada's "feeble-minded." 1913 Nev. Stats. 576, ch. 287.

New Mexico. On March 20, 1925, the Legislature of New Mexico mandated that "[t]here shall be established and hereafter maintained by this State an institution to be known as The Home and Training School for Mental Defectives," for "any person mentally underdeveloped or *faultily* developed" who "requires supervision, care and control for his own welfare, or for the welfare of others, *or for the welfare of the community*, and which mentally defective person is not classified as an insane person." 1925 N.M. Laws 254, ch. 133, §§ 1, 2. Commitment proceedings could be initiated by "[a]ny person over the age of twenty-one years" by alleging "the facts bringing each person within the provisions of this Act and shall state the name and place of residence of such person. . . ." *Id.* at 255, § 5. "The superintendent, with the approval of the Board, may give preference to cases which constitute a *special social menace.*" *Id.*

Oregon. Before authorizing the establishment of a segregative institution, the Oregon Legislative Assembly ordered a formal study. The report that issued indicated that the reason "for custody of feeble-minded" that "outweigh[ed] all others in importance to the State" was that the "*effect of the mingling of the feeble-minded with society* is a *most baneful evil.*" REPORT OF THE BOARD OF BUILDING COMMISSIONERS OF THE STATE OF OREGON

RELATIVE TO THE LOCATION AND ESTABLISHMENT OF AN INSTITUTION FOR FEEBLE-MINDED AND EPILEPTIC PERSONS, TO THE TWENTY-FOURTH LEGISLATIVE ASSEMBLY, REGULAR SESSION, 1970, at 22, 23 (1906). "Once admitted, they remain at the institution *for life.*" *Id.* at 37. The Legislative Assembly followed the recommendation of the report when, on February 23, 1907, it passed "AN ACT Creating the State Institution for Feeble-Minded," for the "care and custody of feeble-minded, idiotic, and epileptic persons." 1907 Or. Laws 145, ch. 83, § 1. The facility was for "all idiotic and epileptic persons" residing in the state for at least a year. *Id.* at 146, § 8.

In 1917, the Legislative Assembly enacted a more sweeping law: "The county judge of any county of this State *shall, upon the application of any citizen* in writing, setting forth that *any person* over five years of age *is feeble-minded or* who, by reason of feeble mindedness, is criminally inclined, or is unsafe to be at large, or may procreate children, *cause such person to be brought before him* at such time and place as he may direct . . . Such judge, if in his opinion said person is feebleminded, shall commit said person to the Institution for the Feebleminded of the state of Oregon for *indeterminate detention. . . .*" 1917 Or. Laws 739, ch. 354, § 1. The same law required that "[a]ll county superintendents of schools shall make reports on the first of June and the first of December of each year to the county courts of their respective counties which report shall contain the names and addresses of all scholars in the public schools and of *all children* of school age in their respective counties who are mentally defective. . . ." *Id.* at 740, § 5.

Soon thereafter, the lawmakers installed a "state board of eugenics," and "declared the duty" of "the superintendent of the state institution for feeble-minded" to "report," on a quarterly basis to the board "all persons, male or female, who are feeble-minded" that "are, or in his opinion are likely to become, a menace to society." 1923 Or. Laws 280, ch. 194, §§ 1, 2. The board's "duty"

was to review the superintendent's opinion and, if in agreement, order sterilization. *Id.* at 280-81, § 3. If the resident failed to consent to the surgery, "such operation shall thereupon be performed upon said person by or under the direction of the superintendent of the institution." *Id.* § 6.

Utah. The "Utah State Training School for Feebleminded" was established in 1929 for "*all* feeble-minded persons who are residents of the State, whose defects prevent them from properly taking care of themselves *or who are a social menace.*" 1929 Utah Laws 102, 108, ch. 75, § 22.

Commitment proceedings could be initiated by "any person" by alleging that someone in the community "by reason of feeble-mindedness is *a social menace.*" *Id.* at 110, § 23(3). "Upon receipt of such application, duly signed and acknowledged, the clerk of the district court shall present the same at the earliest date, and the judge of the district court shall issue a warrant to the sheriff of the county to produce the person described in such application before the court forthwith for examination." *Id.* at 112. If the court "believes" that such person is, "by reason of feeble-mindedness, a social menace" then it "must make an order that such person be confined in the Utah State Training School." *Id.* at 113, § 29.

The same legislation required that "*any patient*" at the institution "should be sexually sterilized" by "the operation of sterilization or *asexualization.*" Such surgery was to be performed "[w]henever the Superintendent and board of trustees of the Utah State Training School shall be of the opinion that it is for the best interests of the patients *and of society.*" *Id.* at 115, § 31.

The state institution was soon filled to capacity. By 1938, the Board of Trustees was able to report to the legislature and the Governor that "[t]he physical growth of the Utah State Training School and the scope of its service to the State of Utah must be recognized as having removed all possible doubt or question as to the *funda-*

mental necessity of maintaining such an institution as a part of the broad program of education *and social regulation and control.*" FOURTH BIENNIAL REPORT OF THE BOARD OF TRUSTEES OF THE UTAH STATE TRAINING SCHOOL, AMERICAN FORK, UTAH, TO THE GOVERNOR AND LEGISLATURE FOR THE BIENNIUM ENDING JUNE 30, 1938, at 3 (1938). "The many actual experiences of the board since the school was established has demonstrated that *the presence of a feebleminded child in a home* is more depressing, expensive and tragic than any known disease. Mental defect vitiates the offspring, and *wounds our citizenry a thousand times more than any plague man is heir to.* Even though this grief is often veiled with a smile, it destroys, demoralizes and sets as naught the lives of too many of our people. The Board of Trustees has considered the so-called South Dakota plan by which responsibility is divided among the different community organizations and state agencies, but all with *the ultimate purpose of segregating, supervising, and then sterilizing* certain of the mentally deficient within the state." *Id.* A major outreach effort was undertaken with the support of the state agency: "Under the welfare program as now operating, community welfare workers are cooperating with the schools in the various communities and in this way many of the mentally deficient *who have heretofore been overlooked and held as problems to their families and immediate neighbors only, are now detected* and the necessity recognized for some action to prevent their continuing as a menace. . . . *When once they are detected and their status is known, proper protection to society requires that they be segregated and supervised, at least until they are sterilized.*" *Id.* at 5.

Washington. In 1905, the Legislature of the state of Washington adopted as an emergency measure "AN ACT providing for the care of defective and feeble minded youth, establishing an institution therefor." 1905 Wash. Laws 133, ch. 70. The law made it "the duty of the clerks of all school districts in the State of Washington at the

time of making the annual reports, to report to the school superintendent of their respective counties the names of all feeble-minded youth residing within their respective districts." *Id.* at 135, § 7. The school superintendents, in turn, were required to annually "report to the State Board of Control" those names. *Id.* at 134, § 4.

The law stated, flatly: "It shall be *the duty* of the parents or guardians of such defective youth to send them to the said institution for feeble-minded." *Id.* at 135, § 9. Moreover, the legislature made it *a crime* for the parents to fail to follow this "duty": upon their failure to send their child to the state institution, the parents "shall *be deemed guilty of a misdemeanor*, and upon conviction thereof, upon the complaint of any officer or citizen of the county or state, before any justice of the peace or superior court, *shall be fined in any sum not less than fifty nor more than two hundred dollars* in the discretion of the court." *Id.*

A 1909 amendment to the law provided that "children who are idiotic, epileptic or afflicted in any particular that renders them *unfitted for companionship with other children shall be segregated. . . .*" 1909 Wash. Laws 260, tit. I., subch. 6, § 2.

In 1913, the legislature changed the name of the state institution to the "State School and Colony," and provided that commitment proceedings could be initiated, without the consent of the parents, by the superintendent of the institution and by county superintendents of schools, and by county commissioners. 1913 Wash. Laws 598, ch. 173, §§ 1, 2. The law provided that "[c]ounty superintendents of schools shall cause to be filled out the prescribed blank applications for admission for such children in their respective districts, who by reason of mental or physical defects are incapable of receiving instruction in the common schools of this state, *or whose habits are such as to render them unfit for companionship with normal children.*" *Id.* at 598-99, § 4. The law also eliminated a restriction in the prior law limiting admissions to

those under twenty-one years of age. *Id.* at 599-600, §§ 8, 9. In accord with the real purpose of the facility, the name was changed once again, this time to "The State Custodial School." 1917 Wash. Laws 224-25, ch. 64.

In 1921, the lawmakers passed "AN ACT to prevent the procreation of feeble minded," which "declared the duty" of the superintendent of the state institution" to report to the Board of Health "all feeble minded . . . who are persons potential to producing offspring who, because of inheritance of inferior *or anti-social traits, would probably become a social menace* or wards of the State." 1921 Wash. Laws 162, ch. 53, § 1. The Board was given "the duty," following an investigation and a hearing, to "make an order directing the superintendent of the institution in which such inmate is confined to perform or cause to be performed upon such inmate such a type of sterilization as may be deemed best by said Board," with the only proviso being that "no person shall be emasculated under the authority of this act except that such operation shall be found to be necessary to improve the physical, mental, neural or psychic condition of the inmate." *Id.* at 163-64, §§ 2, 3.

Wyoming. On February 18, 1907 the Legislature of Wyoming "established in this state an institution for the *custody*, care, education, proper treatment *and discipline* of feeble-minded and epilpetic persons, under the name and style of the "Wyoming Home of the Feeble-Minded and Epileptic." 1907 Wyo. Sess. Laws 188-89, ch. 104, § 1. The institution was created for "*[a]ll* feeble-minded and epileptic persons over the age of six years, who are legal residents of the State of Wyoming." *Id.* at 190, § 9.

Four years later, the name was changed to the "Wyoming School for Defectives," 1911 Wyo. Sess. Laws 166-67, ch. 103, § 1, and an involuntary commitment procedure was established, *id.*

In 1929, the legislature expanded the law to permit the initiation of commitment proceedings by the "pros-

ecuting attorney of the county in which hearing under this Act is proposed to be held, or by *any* citizen of Wyoming," 1929 Wyo. Sess. Laws 156, ch. 95, § 16, and the person to be committed was given the right to demand a jury trial, *id.* at 158, § 20.

District of Columbia

The segregation of retarded people in the District was encouraged and required by the executive and legislative branches of the United States in those days preceding District home rule. The earliest involvement of the United States occurred when, in the nineteenth century, "certain feeble-minded children were taken in charge from time to time by the Secretary of the Interior" and sent to the Pennsylvania Training School at Elwyn. CHARITABLE AND REFORMATORY INSTITUTIONS IN THE DISTRICT OF COLUMBIA: HISTORY AND DEVELOPMENT OF THE PUBLIC CHARITABLE AND REFORMATORY INSTITUTIONS AND AGENCIES IN THE DISTRICT OF COLUMBIA. S. DOC. NO. 207, 69th Cong., 2d sess. 326 (1927).

At the turn of the century the prevailing public sentiment had become one of intolerance. The District Board of Charities in its 1902 Annual Report first called for the establishment of an institution for the District. "Many of the class of children referred to remain children permanently, regardless of their age, and it is important that they should be under custodial care, because of the great menace to the community involved. . . . " S. DOC. NO. 207, *supra* at 327. In 1907, the Board of Charities again stated that it could "not too strongly emphasize the importance of the *permanent segregation* of this class." *Id.* at 328. By 1913, the language of the Board's recommendation had become more urgent yet: "While institutions for the care of the feeble minded are usually designated as 'schools,' it must not be forgotten that many of this class *should be segregated* and under supervision *during their entire lives*, and most of them should *never be al-*

lowed at large. . . . We recommend, therefore, that steps be taken as soon as possible looking to the acquirement of a tract of land and the establishment thereon of a suitable institution for the care and training of the feeble-minded and the *permanent segregation* therein of such of them as are *unfit to be at large in the community*." *Id.* at 329-30. The Monday Evening Club formed a committee to pursuade Congress of the need for "[s]egregation of the adult feeble-minded." *Urges Institution for Feeble-Minded*, Wash. Star, Nov. 18, 1913, at 9.

The United States Department of Labor, through its Bureau of Children's Services, undertook a comprehensive "study of the extent of the problem of mental defectiveness in the District of Columbia," as the Department explained in the introduction to its report, "at the request of a citizen committee . . . organized under the leadership of the Monday Evening Club, [and] composed of representatives of various philanthropic and social agencies and institutions of the District whose dealings with the problems of the community have made them realize the urgent need for securing an institution for the proper care and treatment of mental defectives." U.S. DEPARTMENT OF LABOR, MENTAL DEFECTIVES IN THE DISTRICT OF COLUMBIA: A BRIEF DESCRIPTION OF LOCAL CONDITIONS AND THE NEED FOR CUSTODIAL CARE AND TRAINING 7 (G.P.O. 1915). Federal employees at the Department gathered data regarding "the danger to the *whole community* resulting from the lack of proper provision for those suffering from mental defect." *Id.* at 8.

Under a chapter entitled "reasons for segregation," the Department of Labor listed a number of considerations it thought important. For example, "[a] mentally defective child in a family demands a large share of the energy of the mother and not only interferes with the training of the other children but exercises *a demoralizing influence on the family life*." *Id.* at 20. The "mentally defective" were also a "danger to society": "The number of mental defectives among recidivists empha-

sizes the need of discovering mental defect early in the careers of delinquents and *segregating them permanently* for their own welfare *and for the protection of society. . . .*" *Id.* at 21. Only "[b]y means of *segregating mental defectives* it is possible to cut off at the source a large proportion of degeneracy, pauperism, and crime." *Id.* Indeed, the Department of Labor expressed concern that "[m]any children . . . now in the schools constitute a menace to the other pupils." *Id.* at 18. Thus, according to the federal agency, "[i]nstead of being regarded as an individual misfortune, mental defect has come to be recognized as a destructive social force." *Id.* at 20.

The Department of Labor acknowledged that the establishment of the institution for the District of Columbia would create its own demand: "[T]he number of inmates will increase as the institution becomes better established and as the public becomes familiar with its purposes and the value of its work to those cared for *and to society.* It has been said that the presence in a community of any specified type of defectives becomes apparent only when accommodations are provided for the care of this particular class. Without question this will be found to be the situation in the case of mental defectives." *Id.* at 19. But it would be "out of the question to provide separate institutions for the different types of mental defectives." *Id.* at 24. Referring to the "*various grades*" of "idiot," "imbecile," and "moron," *id.* at 8, 24, the Department recommended that the facility "be large enough to provide the necessary room for *all these classes*, allowing for proper separation of white and colored, male and female," *id.* at 24. The report of the United States Department of Labor concluded by quoting approvingly from an editorial in *Survey* magazine (March 2, 1912): "The greatest need of all is for *more institutional care.* When this has been brought about *in every State* we shall witness a great gaol delivery. . . . Biology and economics unite in

demanding that the strains of *feeble-mindedness shall be eliminated* by the humane *segregation of the mentally defective.*" *Id.* at 28.

The Congress responded to the Department of Labor's strong recommendations, when it "authorized and directed" the District Commissioners "to use a site for a home and school for feeble-minded persons, said site to be located in the District of Columbia. . . ." P.L. No. 67-256, 42 Stat. 39 (1922). The Board of Charities, while generally pleased that Congress had acted, noted that the proviso that the institution be located within the District was "a fatal error" in the enactment. REPORT OF THE BOARD OF CHARITIES OF THE DISTRICT OF COLUMBIA 9 (1922). According to the Board, it would be far better to locate the institution "away from thickly settled communities" since "[f]or these unfortunates, children in mind but many of them old in years, all that society can do is to provide humane and sympathetic care *apart from the excitement and complexities of modern life.*" *Id.* at 10.

In 1923, the Executive Secretary of the Board of Charities, George S. Wilson, accompanied by five other members of the Board, appeared before the Senate Committee on the District of Columbia to express their concern over the specified location of the institution. Wilson testified that "there is a unanimity of opinion on the part of the people of the District of Columbia on this item, greater than we have ever seen exhibited in regard to any matter of great public interest. It is not only the medical and social, and the general welfare organizations, but it is the civic associations and the Board of Trade and other organs of public opinion. At this moment the Board of Trade is circulating among its members a petition, and the Monday Evening club and other bodies are circulating similar petitions, and we are all very much concerned about it." *District of Columbia Appropriations Bill, Hearings Before the Comm. on Appropriations*, 67th Cong., 2d sess. 94-98, 183-84 (Jan. 13, 15, 1923).

In response to questioning by the Senators, Wilson explained further "the difficulties that they have in all these other States. I have just come from a visit to the Michigan school. They have the low-grade idiot, *which the Senator knows is not much above the animal.* They have the imbeciles; *that term is almost self-explanatory.* They have the higher grade, the dangerous cases, the morons, *the fellows that set fire to buildings, and the women who have illegitimate children.* There are at least three classes that no persons having humane instincts would classify together. Those three, multiplied by two to separate the sexes, make six; and then we have to multiply by two to provide for the separate colors here, which makes a minimum of 12 groups of these dependent people that we must provide for—helpless and dependent—and above everything else *unable to associate safely with normal people. Isolation is demanded, absolutely,* and the only thing we can promise to put into their lives is humane *segregation in the open air.*" *Id.* at 96. Wilson concluded his testimony by emphasizing that it was "the segregation from society that is the best of things." *Id.* at 183. Senator Ball commented, "*[i]f you are going to segregate that class* of people to make them more content, you want a farm *entirely separate.*"

The following year, the Congress "authorized and directed" the District Commissioners "to acquire a site for a home and school for feeble-minded persons, said site to be located in the District of Columbia *or in the State of Maryland or in the State of Virginia,* and to erect thereon suitable buildings at a total cost not exceeding $300,000. . . ." P.L. No. 67-457, 42 Stat. 37 (1923).

On March 3, 1925, the Congress enacted "An Act to provide for commitments to, maintenance in, and discharges from the District Training School. . . ." P.L. No. 69-578, 43 Stat. 1135 (1925). The law defined "feeble-minded persons" to include "any person afflicted with mental defectiveness from birth or from an early age, so pronounced that he is incapable of managing himself and

his affairs, or being taught to do so, and who requires supervision, control, and care for his own welfare, or for the welfare of others, or *for the welfare of the community*, and is not insane or of unsound mind. . . ." *Id.* § 2. Congress gave "*any reputable citizen* of the District of Columbia" the authority to initiate commitment proceedings, *id.* § 7, and "if it shall be made to appear to the court by evidence given under oath that it is for the best interest of the alleged feeble-minded person *or of other persons or of the community that such person be at once taken into custody* . . . *id.* § 10, 43 Stat. at 1136.

A week later, on March 10, 1925, the institution, located at Annapolis Junction, "midway between Baltimore and Washington" began operation when "10 boys were received," housed in a "temporary building." REPORT OF THE BOARD OF CHARITIES OF THE DISTRICT OF COLUMBIA 2 (1925). They were immediately put to work: "The boys thus far have been engaged in clearing and grading for the location of buildings, repairing roads, digging trenches, etc., and in general farm work. A good garden was started in time to supply vegetables in abundance during the summer. An encouraging beginning has been made in actual farm work; 60 acres of corn were planted and a good yield will furnish sufficient grain and forage for the stock, chickens, hogs, etc., during the coming winter. Enough potatoes have been raised also to meet the institution needs until next spring." *Id.*

APPENDIX B

I. THE CLEBURNE ORDINANCE IS PART OF A PATTERN OF STATE-IMPOSED, LIFE-LONG SEGREGATION OF RETARDED PEOPLE THAT IN ANIMUS AND PURPOSEFUL UNEQUAL TREATMENT IS PARALLEL TO THE TREATMENT OF BLACK PERSONS.

The decades at the turn into this century imposed a stark legacy upon the country. The xenophobic hysteria of the era, fueled by the new scientism of the eugenics movement, possessed by severe Darwinian strictures and doubts, assaulted by the unprecedented flow of new immigration and the uncertainties of a new industrial age, took on all the force of state power and focused it pervasively against black people and against retarded people and visited upon them the most severe disqualifications imaginable among citizens.

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discourse met "this very difficulty at the outset":

> "We soon realized that having in one of these groups that test to the mentality of say an eight-year-old normal child, we were facing a very interesting problem, as to what was the difference between children who had lived in the world twelve years, and those who had lived twenty years .... In other words, a child who tests according to the Binet test, ten years of age, but is actually fifty years old, may be expected to do a great many things which will quite surprise us because we never have happened to know of a ten-year-old child that could do those things ...."

Goddard's solution to the measurement difficulty?

> "[I]n order to get some accurate idea as to what mental age meant .... we had to cut out all those who were beyond the training period [*i.e.*, those over twenty years]."

Thus Goddard "validated" — and the Era installed and perpetuated in the common prejudice — a measure that does not measure. Goddard, *Four Hundred Feeble-Minded Children Classified By the Binet Method*, 15 J. PSYCHO-ASTHENICS 13 (1910). Others made the point, for example, Kuhlman, *Degree of Mental Deficiency In Children As Expressed By The Relation of Age To Mental Age*, 17 J. PSYCHO-ASTHENICS 132 (1913):

> "Feeble-mindedness is a retarded *rate* of mental development. The term 'arrested development' or 'mental arrest' is a misnomer, for it implies that development has ceased. It is a common observation that feeble-minded children do develop mentally. We also find that their mental ages as measured by the Binet-Simon tests increase as they grow older."

But it is the "ceiling" idea of "mental age" that was codified into invidious

The Jim Crow system segregating people by race was not a 19th century invention, but a creation of this era. C. V. WOODWARD, THE STRANGE CAREER OF JIM CROW (3d rev. ed. 1974). Similarly, large, isolated institutions that separate retarded people from the wider society for life are an invention of this era. Like Jim Crow, these institutions were created by state law *intentionally* to *segregate* retarded people. Thus a regime of state-imposed life-long segregation of retarded people was commissioned, and public, as well as private, attitudes and action that would reinforce it were legitimated and evoked.[6] This case will determine whether it shall be disestablished.

In Texas, Jim Crow was enacted and in force in the first decade of this century.[7] Texas created its first institution "for the feeble-minded" of the State by Act of March 22, 1915.[8] Section 2 of the Act declared as its purpose to end "the heavy economic and moral losses arising from the existence at large of these unfortunate persons." The Superintendent of the State Colony for the Feeble-Minded reiterated its purposes in his Third Annual Report:

> "[T]heir segregation and control, through life, is the remedy. This can be obtained only by legally committing them to an institution where they can be kept permanently."[9]

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stereotype, to wit: The January 7, 1985 *Dallas Morning News* (17A, col. 1) opened a six-column feature story with lead paragraphs saying:

"Sarah is three years old — forever.

"She was born 26 years ago, but something went wrong, and her mind stopped growing at the mental age of three."

6. The exclusion in the Cleburne ordinance at issue here did not first appear in the Cleburne zoning ordinance in 1965 as petitioners have incorrectly asserted throughout. The exclusion of "feeble-minded patients" appeared first in the Cleburne ordinances in 1947. It was taken verbatim from the September 11, 1929 ordinance of the City of Dallas. The relevant portions of both ordinances are reproduced at Appendix B.

7. See, *e.g.*, 1907 Tex. Gen. Laws 38.

8. "An Act to Provide for the Establishment and Maintenance of a State Farm Colony for the Feeble-Minded and to Make Appropriations Therefore, and to Declare an Emergency." 1915 Tex. Gen. Laws 143, ch. 90.

9. *Superintendent's Report* (August 31, 1920) in FIRST ANNUAL REPORT OF THE STATE BOARD OF CONTROL TO THE GOVERNOR AND THE LEGISLATURE OF

The animus of the Act creating the State Colony to segregate retarded people is set forth in a 1914 pamphlet of the Texas State Conference on Charities and Corrections.[10] The pamphlet opens:

> "Every state, to maintain the highest efficiency in its governmental and social functions, must consider the nature of its citizens. We are in the habit of dividing citizens into two classes based on their value to society or their amenableness to social custom and law — desirable and undesirable citizens. The latter class comes in conflict with law and is generally considered a menace to good government." *Id.* at 11.

It continues:

> "The general public has already been educated to the belief that it is a good thing to segregate the idiot or the distinct imbecile, but they have not, as yet, been quite so fully convinced as to the proper treatment of this brighter and more dangerous class, the defective delinquent. From a financial standpoint, segregation of the defective delinquent would be a great economy, to say nothing about the more salient feature, that of stopping them from producing their kind. If we could segregate these defectives when they are young and keep them confined during their natural lives, it would

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THE STATE OF TEXAS 147 (1921) (Does. Coll. Tex. St. Archives).

10. C.S. YOAKUM, CARE OF THE FEEBLEMINDED AND INSANE IN TEXAS, BULLETIN OF THE UNIVERSITY OF TEXAS, NO. 369 (Humanistic Ser. No. 16, Nov. 5, 1914) (on file in Pamph. Coll., Tex. St. Archives, Austin, Tex.). The pamphlet originated as a committee report of the State Conference on Charities and Corrections, which, like conferences in other states and the National Conference on Charities and Corrections, was composed of leading citizens, most often drawn from the leading families — professors, journalists and public officials, including mayors and legislators — and was the active progenitor of the Act of March 22, 1915, as it had been of the juvenile court law, the suspended sentence law and other Progressive Era legislation.

> "It aims to bring together for a free exchange of views and experiences for united action all persons and all organizations and institutions, public and private, engaged or interested in work of a charitable or philanthropic character, or in administering our penal and correctional institutions and agencies."

PROCEEDINGS OF THE STATE CONFERENCE ON CHARITIES AND CORRECTIONS 11-12 (1912) [hereinafter cited as PROCEEDINGS].

obviate the expense of having them committed repeatedly to our penitentiaries when they grow older. . . .

" 'Some may say, "Why it is a pity to confine these children in an institution all their lives"; but that is where they are greatly mistaken, as for instance, in Ohio, I can say to you that we have a community of over 1600 of the happiest children in the State in our institution.' . . . . " *Id.* at 46.

The pamphlet goes on to warn:

" 'To discharge, unsterilized, the defective child, after having taught him habits of neatness and a few tricks that make his mental deficiency less noticeable, is worse than never to have put him in an institution.' In other words, the defective is a person who, for the good of society, must end his line of descent with himself. We have indicated in other places that he is personally a menace to society while alive.

"The only safe procedure is custodial care and institutional care throughout life for the great majority. Some authorities believe that a small percentage of those who are trainable may after a time be returned to society. Even these are usually far better off in an institution where they can earn a living under watchful care. In the paragraphs that follow, we shall describe the type of institution that is best suited to such lifelong protection of these derelicts in society." *Id.* at 66.

The pamphlet concludes:

"A clean-limbed, pure-minded, sane thinking people is an ideal alone commensurate with the ideals of this State and this nation. What shall we do to attain, to eliminate this great and ever-increasing source of ignorance, poverty, and crime? 'One of the most shocking and easily cured evils is the increase of the feeble-minded, the begetters of numerous degenerate children. The remedy is their segregation by the State . . .' The answer comes with no uncertain ring.

"This problem of racial betterment is called in modern phrase, eugenics. Our purpose in this discussion has been limited. We have, therefore, discussed the single phase of

the general problem — the elimination of the defective strains. Many answers and solutions have been offered, among them segregation has appealed to society's feelings of humanity and fair play with greatest force. Restrictive marriage laws and customs are important, and educative, but fail to reach the irresponsible and degenerate till too late. . . . Laissez-faire or natural selection, euthanasia, neo-malthusianism, and polygamy are either impossible under the protective forces of modern social conditions or are ideas repugnant to present-day ideals of religion and humanity. Of all the solutions suggested, the two most advocated are sterilization and segregation. Both of these ideas were embodied in bills submitted to the last Legislature in Texas.

"The evidence so far collected points toward *segregation* as the most feasible, most easily put into force, and least subversive of constitutional prerogative. . . ." *Id.* at 81-83 (pamphlet's emphasis).[11]

This Texas undertaking by force of law of the life-long segregation of retarded persons was universal among the states.[12] Each of the states resolved, *de jure*, *as did Pennsylvania*:

"that the Eastern Pennsylvania State Institution for the Feeble-Minded and Epileptic shall be devoted to segregation, care, maintenance, treatment, training and education of epileptic, idiotic, imbecile or feeble-minded persons,"

1913 Pa. Laws 494, No. 328, § 1; and *as did Florida*:

"that there is hereby established . . . a Florida Farm Colony for Epileptic and Feeble-Minded . . . for the segregation and employment of the epileptic and feeble-minded . . . to the end that these unfortunates may be prevented from reproducing their kind, and the various communities and the

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11. A second, separate section of the Texas pamphlet, addressing care of "the insane" (*id.* at 84-145), reflects confusion of the two (109-128), but nowhere calls for, but rather rejects (100, 136-37) permanent, life-long segregation of mentally ill people.

12. See Appendix A, Compendium of Purposeful State Action for the Segregation and Exclusion of Retarded People in the Fifty States and the District of Columbia [references to App. A hereinafter cited as "A-____"].

State at Large relieved from the heavy economic and moral losses arising by reason of their existence,"

1919 Fla. Laws 231, §§ 1, 8; and *as did Utah*, in the same year the predecessor to the Cleburne ordinance was enacted, 1929 Utah Laws 102, ch. 75, §§ 1, 29 (App. A-71.).

The animus of each was everywhere the same. A sampling from Appendix A of the very titles recurrent among the many pamphlets advancing institutional segregation describes vividly that ill-will: *The Menace of the Feeble-Minded in Pennsylvania* (1913); *The Menace of the Feeble-Minded in Connecticut* (1915); *The Burden of Feeble-Mindedness* (1912) (Mass.); *The Feebleminded, Or, The Hub to Our Wheel of Vice* (1913) (Ohio).

The policy of exclusion of retarded people, implemented through state action, is epitomized by a Mississippi law creating a "Colony for the Feebleminded" for the segregation of "all cases" deemed "*unfit for citizenship.*"[13] That law, and the others like it, present as starkly as imaginable the essence of an equal protection violation, exclusion of a particular people from the very "*citizenship*" of the land. Government officials in every state established formal policies in inexorable fashion: Retarded people were "entirely unfit to go into general society,"[14] a "menace to the happiness . . . of the community,"[15] "unfitted for companionship with other children,"[16] a "blight on mankind"[17] whose very "presence"[18] in the community was "detrimental to normal" people,[19] and whose "mingling . . . with society" was "a most baneful evil."[20]

Official policy was to "prevent this class of persons from coming in contact with the populace,"[21] to "purge society"[22] of these

13. A-47 (emphasis provided); *see also* A-19 (Pa.).

14. A-43 (Wis.); *see* A-24 (Ind.) ("unfit to be out in the world").

15. A-44 (Ala.).

16. A-74 (Wash.).

17. A-21 (Vt.).

18. A-21 (R.I).

19. A-63 (Cal.).

20. A-70 (Ore.).

21. A-67 (Colo.).

"anti-social beings,"[23] to "segregate [them] from the world,"[24] so that they "not . . . be returned to society"[25] since "[m]ental defect . . . wounds our citizens a thousand times more than any plague."[26] "Nothing" would better "promot[e] our best citizenship, than to segregate the feeble-minded."[27]

To that end, the enactments of nine state legislatures specified "segregation" in the body of their laws[28] and the official documents of practically each other state and of the United States for the District of Columbia specified the same object.[29]

Institutions, as a matter of law, were houses of "detention"[30] where retarded "inmates" were "kept"[31] and "held"[32] "for life."[33] As the official reports indicate, detention would be "permanent,"[34] in the nature of "an indeterminate sentence"[35] to the "institutional community where he'll always live,"[36] since "a defective child will be a defective adult, and will die a defective. There is not a philosopher's stone to turn the base metals of defect into gold."[37] They could never be let "loose in the world,"[38]

22. A-43 (Wis.).
23. A-19, 20 (Pa.).
24. A-23 (Ind.).
25. A-34 (Neb.).
26. A-73 (Utah).
27. A-21-22 (Vt.).
28. A-45 (Fla.); A-29 (Ky.); A-47 (Miss.) ("isolation and segregation"); A-35 (Neb.) ("to segregate them from society"); A-9 (N.H.); A-19 (Pa.); A-38 (S.Dak.); A-57, 59 (Va.); A-74 (Wash.).
29. *E.g.*, A-66 (Cal.); A-67 (Colo.); A-2 (Conn.); A-27 (Kan.); A-23 (Ind.); A-8 (Mass.); A-31 (Mich.); A-10 (N.J.); A-18 (N.Y.); A-49 (N.Car.); A-37 (Ohio); A-50-51 (S.Car.); A-56 (Tex.); A-73 (Utah); A-22 (Vt.); A-43 (Wis.) ("separating them from society"); A-77-78 (U.S.).
30. *E.g.*, A-22 (Ill.); A-69 (Mont.); A-34 (Neb.); A-37 (Ohio); A-71 (Ore.); A-20 (Pa.).
31. A-11 (N.J.)
32. A-62 (Ariz.)
33. A-62 (Cal.); *see* A-1 (Conn.); A-35 (N. Dak.)
34. A-8 (Mass.); A-33 (Mo.); A-10 (N.J.); A-19 (Pa.); A-56 (Tex.); A-77 (U.S.).
35. A-59 (Va.); *see* A-67 (Colo.) (to be "kept in an institution indefinitely"); A-71 (Ore.) "indeterminate detention").
36. A-43 (Wis.).
37. A-46 (Ga.).

and it was felt especially important to keep them "away from thickly settled communities,"[39] "remote from the centers of population for reasons that are obvious."[40] Retarded persons simply did not have the "rights and liberties of normal people."[41] The Executive Secretary of the District of Columbia Board of Charity urged a congressional committee to authorize the erection of an institution since retarded people are "not much above the animal."[42] State officials elsewhere also sought to remove retarded people from the realm of humanity, referring to them as "not far removed from the brute."[43] They were not quite persons, but "by-products of unfinished humanity."[44]

Retarded people were segregated for being a "nuisance to the community,"[45] or a "menace to the happiness . . . of others in the community,"[46] or a "menace to society,"[47] or "for the welfare of the community"[48] or "of society,"[49] or so that "the state at large [may be] relieved from the heavy economic and moral losses arising by reason of their existence."[50] It was important to find a "way of getting rid of these kinds of cases."[51]

Official reports labeled retarded people "a parasitic, predatory class,"[52] a "danger to the race,"[53] "a blight and a misfortune both to themselves and to the public,"[54] whose role "in discount-

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38. A-67 (Colo.).
39. A-79 (U.S.).
40. A-2 (Conn.).
41. A-41 (S.Dak.).
42. A-80.
43. A-58 (Va.).
44. A-53 (Tex.).
45. A-22 (Ind.).
46. A-44 (Ala.); A-46 (Ga.); A-47 (Miss.); A-51 (Tenn.); A-60-61 (W.Va.).
47. A-68-69 (Idaho); A-43 (Wis.); A-72 (Utah) ("a social menace").
48. A-62 (Ariz.); A-22 (Ill.); A-47 (La.); A-70 (N.Mex.); A-80-81 (U.S.).
49. A-35 (Neb.).
50. A-45 (Fla.); *accord*, A-55-56 (Tex.).
51. A-3 (Conn.); *see* A-68 (Hawaii) ("a place to get the feeble-minded out of the community").
52. A-8 (Mass.); A-21 (Vt.).
53. A-43 (Wis.).
54. A-27 (Kan.).

ing social progress is by far the most potent influence for evil under which society is struggling today."[55]

The states actively inculcated fear of retarded persons, directed their identification and removal from the community, and enlisted assistance of the public to do so. Government officials undertook major outreach efforts.[56] Physicians, teachers, and social workers were required by law in some states to report to the government all persons "believed by them to be feeble minded."[57] Other states made it "one of the special duties of every health officer and of every public health nurse to institute proceedings to secure the proper segregation and custody of feebleminded persons."[58] Those states with no formal reporting or registration requirement at least officially encouraged health, welfare, and social workers to be "constantly on the lookout"[59] for potential cases to be institutionalized, and authorized a wide variety of public and private persons[60] —or sometimes simply "any reputable citizen"[61]—to institutionalize a person if a parent or relative "either neglect[ed] or refus[ed]" to do so.[62] Washington state legislators dispensed with that procedure and simply made it a criminal offense, punishable by a $200 fine, for any parents refusing to perform their "duty" to segregate in the state institution their "feebleminded" son or daughter.[63] Some states even permitted detention temporarily with no procedural rights for those who were "suspected of being feebleminded or idiotic."[64] Once parents placed their child in an institution, some states required them to "waive all right to remove such inmate there-

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55. A-24 (Ind.).

56. *E.g.*, A-62-63, 65-66 (Cal.); A-25 (Ind.); A-56 (Tex.).

57. A-40 (S.Dak.); *see also* A-71 (Ore.).

58. A-29 (Ky.); *accord*, A-52 (Tenn.).

59. A-28 (Kan.).

60. *E.g.*, A-66 (Cal.) ("any peace officer"); A-49 (N. Car.) ("ministers, teachers, or physicians); A-50-(Okla.) ("trustees of any township"); A-21 (Vt.) (the "selectman of [any] town"); A-75 (Wyo.) (the county prosecutor).

61. A-5 (Del.); A-22 (Ill.); A-46 (La.); A-51 (Tenn.); A-61 (W.Va.).

62. A-47-48 (Miss.); A-51 (Tenn.); A-61 (W.Va.); *see* A-44 (Ala.) ("notwithstanding the family or relatives may object thereto"); A-50 (Okla.).

63. A-74.

64. *E.g.*, A-36 (N.Dak.).

after either permanently or for a limited time."[65] All of these steps, and others, were thought necessary to segregate those "whose parents or guardians are averse to such actions."[66] Government officials made the judgment that "the presence of the unfortunate child in the home"[67] was "more tragic than any known disease,"[68] and a "menace to . . . the family."[69]

The regime of segregation reached to and was reinforced by systematic exclusion from public schooling,[70] forced sterilization,[71] peonage,[72] bans upon marriage and exercise of the franchise,[73] and even reached to the death of "defective" babies.[74]

Where did it all come from? Previously, in the mid-19th century, Dr. Samuel Gridley Howe and others had established residential schools for retarded people, all small, in or near the towns, with the purpose that retarded children should attend, learn, and return after a little while to their homes to live and to work. Howe insisted that the schools should not become custodial and warned against life-long segregation.[75] By the turn into

65. A-30 (Mich.); A-11 (N.J.); *accord*, A-69 (Mont.); A-36 (N.Dak.).

66. A-66 (Cal.); *accord*, A-34 (Neb.) (need for retarded people to be "detained in the institution against the desire of the parent").

67. A-21 (R.I.).

68. A-73 (Utah).

69. A-63 (Cal.); A-6 (Md.).

70. The history of exclusion from the schools is noted in *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F.Supp. 279, 294-95 (E.D. Pa. 1972); *Board of Education of Hendrick Hudson School District v. Rowley*, 458 U.S. 176, 191(1982); and committee reports on the Education of All Handicapped Children's Act, *e.g.*, S. REP. No. 94-168, 94th Cong., 1st sess. 9 (1975).

71. *E.g.*, A-63-64 (Cal.); A-26 (Iowa); A-5 (Me.); A-59-60 (Va.).

72. *E.g.*, A-3,4 (Conn.); A-81 (D.C.). Indiana required by law that "the labor in constructing" all of the institution's "buildings, improvements, and facilities shall be supplied as far as possible by the persons committed to the institution." A-24.

73. *See* Brief of Amici AAMD, *et al.*; Wald, *Basic Personal and Civil Rights* in PRESIDENTS COMMITTEE ON MENTAL RETARDATION, THE MENTALLY RETARDED CITIZEN AND THE LAW 3, 7-9, 25 (M. Kindred, *et al.*, eds. 1976).

74. *Defective Babe Dies As Decreed: Physician, Refusing Saving Operation, Defends Course as Wisest for Country's Good, Watches as Imbecile Child's Life Wanes*, N.Y. Times, Nov. 18, 1915, at 1, col. 3.

75. For Howe's position, see pp. A-6-7.

the new century, however, the times had changed. In 1903 Walter Fernald, a Massachusetts official and a leading figure in the Association of Medical Officers of American Institutions for Idiotic and Feeble-Minded Persons, dismissed Howe's view, saying:

> "[T]he Doctor wrote before the tide of immigration had set so strongly to our shores. . . . What is to be done with the feeble-minded progeny of the foreign hordes that have settled and are settling among us?"[76]

A solution equal to the severity and the magnitude of the problem was imperative. In 1913-14, at the request of the United States Public Health Service, Henry H. Goddard — the acclaimed author of *The Kallikak Family* [77] — administered Binet's IQ test to the southern and eastern European immigrants arriving in steerage at Ellis Island. "[G]iv[ing] the immigrant the

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76. P. TYOR. SEGREGATION OR SURGERY: THE MENTALLY RETARDED IN AMERICA, 1850-1920, at 160 (Diss. Nw. Univ. 1972), *published in* P. TYOR & L. BELL, CARING FOR THE RETARDED IN AMERICA: A HISTORY (1984). The standard historical works on America's treatment of retarded people include P. TYOR, *supra*; S. B. SARASON & J. DORIS, PSYCHOLOGICAL PROBLEMS IN MENTAL DEFICIENCY, chs. 12-16 (4th rev. ed. 1969), and EDUCATIONAL HANDICAP, PUBLIC POLICY AND SOCIAL HISTORY (1979); *see also* Appendix D to this Brief.

77. THE KALLIKAK FAMILY (MacMillan, 1912). Asking "What is to be done?" *The Kallikak Family* concludes:

> ". . . For the low-grade idiot, the loathsome unfortunate that may be seen in some of our institutions, some have proposed the lethal chambers. But humanity is steadily tending away from the possibility of that method. . . . "We cannot successfully cope . . . until we recognize feeble-mindedness and its hereditary nature, recognize it early, and take care of it.
>
> "[S]egregation through colonization seems in the present state of our knowledge to be the ideal and perfectly satisfactory method."

Id. at 101, 116-117. The leading standard historical works describing the pervasive place of eugenics in the era and its decisive role in action against immigrants, blacks and retarded people include M. H. HALLER, EUGENICS: HEREDITARIAN ATTITUDES IN AMERICAN THOUGHT (1963); K. M. LUDMERER, GENETICS AND AMERICAN SOCIETY: A HISTORICAL APPRAISAL (1972); L. KAMIN, THE SCIENCE AND POLITICS OF I.Q. (1974); Kevles, *Annals of Eugenics*, NEW YORKER Oct. 8, 1984, at 99-115; *id.* Oct. 15, 1984, at 99-125; *id.* Oct. 22, 1984, at 92, 93.

benefit of every doubt," he found that 79% of the Italians, 80% of the Hungarians, 83% of the Jews and 87% of the Russians were feeble-minded.[78]

This was — as Kenneth M. Stampp writes in his historiographical analysis of this early 20th Century era — "a time when xenophobia had become almost a national disease." It was a time "when Negroes and immigrants were being lumped together in the category of unassimilable aliens." During the first decades of the century,

> "the new immigrant groups had become the victims of cruel racial stereotypes. Taken collectively it would appear that they were, among other things, innately inferior to the Anglo-Saxons in their intellectual and physical traits, dirty and immoral in their habits, inclined toward criminality, receptive to dangerous political beliefs and shiftless and irresponsible. In due time, those who repeated these stereotypes awoke to the realization that what they were saying was not really very original — that, as a matter of fact, these generalizations were *precisely* the ones southern men had been making about Negroes for years."[79]

And the solution for the now apprehended "common problem" was, in the new decades of a new century, precisely similar: state-imposed segregation alike of "the Negro" and of retarded people.

The animus that supported segregation of "the feeble-minded" bore unmistakable similarity to the animus that evoked Jim Crow. *Compare* titles like *The Menace of the Fee-*

78. Goddard, *Mental Testing and the Immigrants*, 2 J. DELINQUENCY 243, 249, 252 (1917). Additional "findings" were extensively reported, *e.g.*, N.Y. Times, Jan. 13, 1913, at 10 ("*Alien Defectives*"); *see* A-12-16, 64-65.

79. K. M. STAMPP, *The Tragic Legend of Reconstruction*, the introduction in ERA OF RECONSTRUCTION 19-20 (1965) (Stampp's emphasis).

The standard historical works on the response of the era to immigration, describing its crucial contribution to the adoption of Jim Crow and its identification of new immigrants as so fearfully subhuman as to require state action, include T. J. ARCHDEACON, BECOMING AMERICAN: AN ETHNIC HISTORY 158-172 (1983); J. HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925, at 131-175 (1978); O. HANDLIN, THE UPROOTED 247-267 (2d ed. 1973); *see also* J. S. HALLER, OUTCASTS FROM EVOLUTION: SCIENTIFIC ATTITUDES OF RACIAL INFERIORITY, 1859-1900, at 170-175 (1971).

bleminded in Connecticut (1915) *with* such popular southern works advancing Jim Crow as *"The Negro a Beast": Or "In the Image of God"* (1900); *The Negro: A Menace to American Civilization* (1907). They were, alike, "a part of the then current literature of the 'Yellow Peril' school and the flourishing cult of Nordicism."[80]

Champions of life-long segregation for retarded people explicitly invoked the then-exploding prejudice against black people. For example, in 1903, Martin W. Barr, President of the American Association of Medical Officers for Institutions for Idiotic and Feeble-Minded Persons, addressed the virtues of "life-long custodial service" in retardation institutions in these terms:

> "[T]hey partake of the industrial and manual training given in the antebellum days on the plantation, which were in fact — as the world is fast acknowledging — training schools for a backward race, many of whom were feeble-minded."[81]

The recitations of the arguments supporting life-long institutional segregation of retarded people matched the recitations on behalf of Jim Crow: "the shibboleths of . . . the Negro's innate inferiority, shiftlessness, and hopeless unfitness for full participation in the white man's civilization"; invocation of "the su-

80. C. V. WOODWARD, THE STRANGE CAREER OF JIM CROW 94 (3d rev. ed. 1974). Other standard historical works on Jim Crow include J. H. FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS (5th ed. 1980); R. KLUGER, SIMPLE JUSTICE (1975); I. A. NEWBY, JIM CROW'S DEFENSE: ANTI-NEGRO THOUGHT IN AMERICA 1900-1930 (1965); G. M. FREDERICKSON, THE BLACK IMAGE IN THE WHITE MIND (1971).

81. Barr, *State Care of the Feebleminded*, 76 N.Y. MED. J. 1159 (1903). *Compare* the 1900 address of the President of the Southern Education Association on behalf of Jim Crow, *quoted in* C. V. WOODWARD, *supra* note 80, at 95.

Champions of Jim Crow invoked the stereotypes of feeblemindedness against black people. For example, Henry Fairfield Osborn, leading paleontologist and President of the American Museum of Natural History from 1908 to 1933, wrote that the intelligence of "the Negro" rarely exceeded "that of the eleven-year-old youth of the species Homo sapiens"; A. B. Hart wrote, "the Negro mind ceases to develop after adolescence." Osborn, *The Evolution of Human Races*, 26 NAT. HIST. 3 (1926); A. B. HART, THE SOUTHERN SOUTH 104 (1910).

preme law of self preservation"; and the necessity of "the stronger and cleverer race, free to impose its will upon new caught, sullen peoples."[82] William Graham Sumners' 1907 *Folkways* was seized upon to establish "the irremedial backwardness of the negro and the futility of efforts to improve him."[83]

Asserted dangerousness was crucial to the arguments for permanent segregation. For Jim Crow, "a sensational press played up and headlined current stories of Negro crime . . ., a daily barrage of Negro atrocity stories."[84] For life-long segregation of retarded people, the fiction of their dangerousness was also systematically invented and perpetuated. In Texas, for example, in 1914, the State Conference on Charities and Corrections was told by one of its leaders:

> "The refusal of Texas to make provision for its feeble-minded for the simple reason that from them they fear no personal bodily violence is an increasing menace to the mental and spiritual life of our State, in contrast to which the fancied physical safety is negligible. I have used the phrase fancied physical safety, advisedly, for security from bodily ills is not gained through segregation of the insane and promiscuous freedom of the feeble-minded. . . . Not only are the feeble-minded a menace as regards actual criminal proclivities but they are equally a menace as regards public health. [85]

The Jim Crow movement proceeded in "mounting stages of aggression" until, by 1911 " '[i]ts spirit is that of an all-absorbing autocracy of race, an animus of aggrandizement which makes, in the imagination of the white man, an absolute identification of

82. C. V. WOODWARD, *supra* note 80, at 70, 72-73.

83. R. KLUGER, *supra* note 80, at 86.

84. C. V. WOODWARD, *supra* note 80, at 86.

85. PROCEEDINGS (1914), *supra* note 10, at 63. The General Secretary of the National Conference on Charities and Corrections had in 1899 set the National Conference on a campaign to persuade the public that "the feeble-minded" were dangerous. Johnson, *Report of the Committee on Colonies for Segregation of Defectives*, 30 PROC. NATL CONF. CHARITIES & CORRECTIONS 248–49 (1903), *quoted in* P. TYOR, *supra* note 76, at 184; *see also* Barr, *The Imbecile and Epileptic Versus the Taxpayer and the Community*, 29 PROC. NATL CONF. CHARITIES & CORRECTIONS 163 (1902).

the stronger race with the very being of the state.' "[86] As Richard Kluger has written:

> "Keeping blacks separate, everyone understood, would prevent contamination of white blood by the defective genes of colored people, whose unfortunate traits stemmed from their tribal origins in densest Africa and were incurably fixed upon the face from generation to generation. . . . [T]heir very blackness bespoke their low and brutish nature. All literature, folklore, and custom of the English-speaking peoples reinforced the notion that the African's tawny hide was a primal stain."[87]

The apotheosis of the demands of racial purity was, as the State of Kentucky represented to this Court in its brief in *Berea College v. Kentucky*, 211 U.S. 45 (1908):

> "If the progress, advancement and civilization of the twentieth century is to go forward, then it must be left not only to the unadulterated blood of the Anglo-Saxon-Caucasian race, but to the highest types and geniuses of that race. . . ."[88]

The demands of "racial betterment" required the very most severe measures within their grasp. Solutions beyond segregation were examined but had to be discarded. The Texas pamphlet was illustrative: ". . . euthanasia, neo-malthusianism, and polygamy are either impossible under the protective forces of modern social conditions or are ideas repugnant to present day ideas of religion and humanity." *Segregation* "has appealed to society's feelings of humanity and fair play with greatest force." *Segregation* is "the most feasible, most easily put into force, and *least subversive of constitutional prerogative*"[89] — a plain statement of the impact on the Era of *Plessy v. Ferguson*, 163 U.S. 537, 544-52 (1896). Without *Plessy's* permission, no state in contemplation of the Fourteenth Amendment could have dared to impose life-long segregation upon any citizen.

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86. C. V. WOODWARD, *supra* note 80, at 108.

87. R. KLUGER, *supra* note 80, at 305.

88. *Id.* at 87.

State-imposed segregation was justified as benign and even beneficial to its victims according to the near constant professions of those who established it. Segregation of "the feebleminded," the Texas rationale went, consistent with a "deep and abiding charity," "permits all to live under those circumstances best suited to make each useful and happy."[90] As to segregation by race, a Texan wrote, "both races believe that a separate social life is most desirable and most practical."[91] Jim Crow in Texas was not "petty persecution of the Negro, attributed to a desire to humiliate, stigmatise, and degrade him, [it is] the embodiment of enlightened public policy, and is the surest guarantee of a minimum of friction between the races."[92] Separation, President Woodrow Wilson said, was "not humiliating, but a benefit . . . 'rendering them more safe in their possession of office and less likely to be discriminated against.' "[93]

The Cleburne ordinance excluding "homes for the . . . feebleminded" is thus not an isolated enactment but the perpetuation of a pattern of invidious inflictions.[94] Indeed, the legislation from which Cleburne's exclusionary provision is copied — Dallas' ordinance of 1929[95] — was formulated in the era that established the state regime for the life-long segregation of retarded people.

This case will determine whether that regime of segregation will be disestablished and whether a decent respect will be ex-

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90. *Id.* at 83.

91. R. E. SMITH, CHRISTIANITY AND THE RACE PROBLEM 10 (1922).

92. A. H. STONE, STUDIES IN THE AMERICAN RACE PROBLEM 64 (1908).

93. R. KLUGER, *supra* note 80, at 91.

94. Amici had available to them, in the library of the University of Texas at Austin, current zoning ordinances of sixty Texas cities. Of these, the codes of twelve cities explicitly exclude homes for persons with retardation from neighborhoods where comparable dwellings for non-retarded persons are permitted. They are AMARILLO CODE, chs. 26-8, 26-11(43a); BEAUMONT CODE, §42-15(A)(1); CARROLLTON CODE, art. XV(14); COPPERAS COVE CODE, §5(40(m); DUNCANVILLE CODE, art. III(14); EDINBURG CODE, art. IV, §4-2(3); KILLEEN CODE, ch. 9, art. 2, §8-10; MIDLAND CODE, §11-1-10(A); NEW BRAUNFELS CODE, §6C.1-6; PORT NECHES CODE, §24-6; SAN ANGELO CODE, §33-2-14(6); SULPHUR SPRINGS CODE, art.6(a).

95. The ordinances are set out in ADD. B.

tended to retarded people. Disestablishing that regime requires the full measure of equal protection lest retarded people be again treated as "unfit for citizenship."[96]

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96. 1920 Miss. Laws 288, set out at p. A-47.

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No. 99-1240

IN THE

Supreme Court of the United States

THE UNIVERSITY OF ALABAMA AT BIRMINGHAM, BOARD OF TRUSTEES and the ALABAMA DEPARTMENT OF YOUTH SERVICES,
Petitioners,

v.

PATRICIA GARRETT and MILTON ASH,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE AMERICAN ASSOCIATION ON MENTAL RETARDATION, THE ARC, THE BRAIN INJURY ASSOCIATION, THE JOSEPH P. KENNEDY, JR. FOUNDATION, THE NATIONAL COUNCIL FOR COMMUNITY BEHAVIORAL HEALTHCARE, THE AMERICAN PSYCHIATRIC NURSES ASSOCIATION and THE INTERNATIONAL ASSOCIATION FOR PSYCHOSOCIAL REHABILITATION SERVICES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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Noll, Steven, *Feeble-Minded in Our Midst: Institutions for the Mentally Retarded in the South, 1900-1940* (1995) 7, 8
Tushnet, Mark V., *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961* (1994) 4

INTEREST OF *AMICI CURIAE*

Amici curiae are seven national disability organizations (more fully described in the Appendix) with an interest in protecting people with disabilities from invidious and irrational discrimination.[1]

SUMMARY OF ARGUMENT

When compared with other kinds of discrimination that have been addressed by Congress and by this Court, discrimination on the basis of disability presents relevant differences, as well as similarities. Respondent and other supporting *amici* have elaborated both the legislative history of the ADA and the larger societal history of mistreatment of people with disabilities. This brief offers a perspective on how these histories fit into the framework of this Court's Fourteenth Amendment jurisprudence.

The history of this Nation's treatment of people with disabilities has been described in this Court as "grotesque." Any fair reading of that history must acknowledge abuses by the States, often based on stereotypes and misunderstanding, and must conclude that these problems have been systemic rather than isolated. As with race and gender, despite considerable efforts over the last thirty or forty years, much of this mistreatment (and the attitudes that produced it) survive.

A centerpiece of this history is the failure of States to recognize the full citizenship of people with disabilities. Sometimes this exclusion was the product of fear and discomfort engendered by negative attitudes toward disabilities. Other instances arose from unexamined assump-

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[1] This brief was written entirely by counsel for *amici*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief. Both parties have given written consent to the filing of this brief.

tions that people with disabilities cannot productively contribute to society or that including them would be more trouble than it is worth. But whatever the genesis of a particular discriminatory policy, it is this pattern of exclusion from the community—*exclusion from full citizenship*—that distinguishes it from discrimination on the basis of age, economic status, or other traits.

This Court has noted that some laws based on disability are rational and thus are not *presumptively* unconstitutional, as race and gender laws have been held to be. The Court made clear that this would free *legislators* from unwarranted supervision by the judiciary. State actions that address people with disabilities as a separate group contain both practices based on stereotypes that linger insidiously and recent efforts to address their problems from a more enlightened perspective. But as was true of race and particularly gender, some of the ameliorative efforts were themselves based on assumptions that failed to recognize the full citizenship of people with disabilities. One reason is the persistence of the attitudes themselves. Prejudice, once loosed is not easily cabined. And its durability is magnified by the continuing effects of past exclusion and segregation. States often continue discriminatory practices, both due to inertia and to the vested political interests of persons and groups who benefit from the status quo.

Congress recognized all of these facts when it enacted the ADA. Legislative factfinding was extensive and Congress also had the benefit of experience under earlier enactments involving disabilities. It reasonably concluded that a comprehensive civil rights statute was needed and that States, as a principal source of the problem, must be covered.

The question presented by this case is whether this carefully considered enactment was beyond Congress' power under Section 5 of the Fourteenth Amendment. Petitioner asks this Court, in effect, to limit the scope of that authority to

race and gender. Doing so would tell people with disabilities that they are ineligible for relief from State-sponsored and State-perpetuated discrimination in both the Federal courts and the Congress. And it would say to members of Congress that no matter how serious and persistent the problem they address, and no matter how carefully they act, they lack civil rights authority unless the class they seek to protect is essentially pre-approved by this Court.

The civil rights authority of Congress should not be employed casually or frivolously as an excuse to cater to politically powerful groups. But people with disabilities, having suffered a long history of mistreatment and exclusion by their States, and enduring the continuing legacy of that mistreatment, should be able to seek full citizenship by petitioning for relief from their national government.

ARGUMENT

I. DISCRIMINATION ON THE BASIS OF DISABILITY HAS UNIQUE ATTRIBUTES WHICH THE CONGRESS RECOGNIZED, AND WHICH SHOULD INFORM THIS COURT'S ANALYSIS OF CONGRESS' AUTHORITY UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT.

Discrimination is not a uniform and unvarying phenomenon in American life. Denials of constitutional rights take different forms for each group that experiences discrimination. "[W]hile all prejudice has common roots and features, in combating such bias each group confronts a somewhat different legal template." *Amici Curiae* Brief of American Association on Mental Retardation *et al.*, *Romer v. Evans*, 94-1039, at 18. The unique characteristics of disability discrimination require special care from both the Congress and the courts.

A. The Development of Civil Rights Law, Both Judicial and Legislative, Has Varied For Different Groups.

The struggles against discrimination in American history have not followed a single path. Many groups of Americans have experienced invidious discrimination, and for each, there has been an evolution in this Court's understanding of the requirements imposed by the Equal Protection Clause. *Compare Hoyt v. Florida*, 368 U.S. 57 (1961), *with J.E.B. v. Alabama*, 511 U.S. 127 (1994). Some of this evolution is attributable to doctrinal changes in the Court's jurisprudence, but often it coincides with changing attitudes among the American people.

Constructing protections against invidious and irrational discrimination is not a simple task. How such changes are accomplished is a complex process, in which both the courts and legislative bodies have played crucial roles. The relationship between judicial recognition of the scope of constitutional protection, on the one hand, and legislative enactments to prevent discrimination, on the other, has varied. Sometimes, as with race, this Court's case law has substantively developed before the enactment of key anti-discrimination laws. For other groups, there has been important Congressional action prior to the full development of this Court's principal constitutional remedies. *Compare, e.g.*, the sequential relationship between *Brown v. Bd. of Education*, 347 U.S. 483 (1954) and the Civil Rights Act of 1964, 78 Stat. 241, *with* the relationship between the inclusion of gender discrimination in Title VII of the same statute *with Reed v. Reed*, 404 U.S. 71 (1971).[2]

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[2] *See generally* Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961* (1994); Kerber, *No Constitutional Right to be Ladies: Women and the Obligations of Citizenship* (1998).

The principal lesson to be drawn from these diverging histories is that Congress and the courts are well advised to regard respectfully each other's findings regarding the necessity of protections against discrimination. Sometimes Congress, perhaps acting with insufficient care and circumspection, may have overestimated its authority to enact protections pursuant to its authority under the Fourteenth Amendment. *See generally Kimel v. Florida Board of Regents*, 120 S.Ct. 631, 649 (2000). At other times, with the hindsight of history, this Court may have assigned insufficient weight to concerns about constitutionally unacceptable discrimination against a particular group. *See generally Goesaert v. Cleary*, 335 U.S. 464 (1948); *Buck v. Bell*, 274 U.S. 200 (1928). The intersecting roles played by different branches of our government in addressing discrimination against disfavored groups is not a topic that admits of facile answers or hard and fast rules. Careful attention must be paid to the particulars of the unique discrimination encountered by each group and to the findings of the coordinate branch of government. Discrimination against people with disabilities presents the complexity of these issues in particularly sharp focus.

B. Disability, More Frequently than Race or Gender, May Be Relevant to Some Legitimate Governmental Purposes.

As this Court has recognized, mental retardation is not invariably irrelevant to constitutionally legitimate purposes. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). There is no reason to doubt that the same conclusion would be reached regarding other forms of mental and physical disability.[3] The issue in this case is what

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[3] *Amici* do not mean to minimize the importance of the distinction between race and gender, on the one hand, and disability, on the other. Disability is sometimes relevant to legitimate state actions, even some that affect fundamental rights. *Amici* do not suggest, nor did Congress, that

significance that observation has for the scope of *legislative* enactments.

Cleburne's addition of presumptive irrelevance to the factors that otherwise point toward semi-suspect status, *see generally. Frontiero v. Richardson*, 411 U.S. 677, 684-88 (1973) (plurality opinion), addresses concerns about the appropriate role of the judiciary in evaluating cases of disability discrimination. The *Cleburne* opinion initially observed that "where individuals in the group affected by a law have distinguishing characteristics relevant to" legitimate governmental interests, "*the courts* have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize *legislative choices* as to whether, how, and to what extent those interests should be pursued." 473 U.S. at 441-42 (emphasis supplied). Similarly, the Court noted that how the group of people with mental retardation "is to be treated under the law is a difficult and often a technical matter, *very much a task for legislators guided by qualified professionals* and not by the perhaps ill-informed opinions of the judiciary. Heightened scrutiny inevitably involves substantive judgments about legislative decisions, *and we doubt that the predicate for such judicial oversight* is present where the classification deals with mental retardation." *Id.* at 442-43 (emphasis supplied).

Even more dramatically, *Cleburne* expressed concern that by recognizing semi-suspect status for judicial cases, the Court might inadvertently discourage legislators from

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States could never treat any people with disabilities differently than nondisabled people in any context. But state laws that discriminate on the basis of disability have often been the product of irrational and invidious prejudice. The continued existence and enforcement of those laws and practices is often the product of tenacious remnants of that prejudice, and of an almost unconscious acceptance that the exclusion of people with disabilities from central aspects of their communities' life is "just the way things are."

addressing the problem. "Even assuming that many of these laws could be shown to be substantially related to an important governmental purpose, merely requiring the legislature to justify its efforts in these terms may lead it to refrain from acting at all." *Id.* at 444. From this observation, the Court concluded that "governmental bodies must have a certain amount of flexibility and *freedom from judicial oversight* in shaping and limiting *their remedial efforts*." *Id.* at 445 (emphasis supplied).

But *Cleburne's* freeing of legislators from unduly intrusive and possibly chilling judicial oversight did not change either the "grotesque" history of mistreatment of people with disabilities, nor did it eliminate the irrational and unconstitutional laws like the Cleburne ordinance. Such laws and practices endure, and in the ADA, Congress has sought to address this problem.

C. The Invidious and Irrational Discrimination that People with Disabilities Have Experienced Has Been Uniquely Virulent.

People with disabilities have confronted an extraordinary history of discrimination before the law. Although this history is not identical to that faced by racial minorities and women, neither is it of a different order of magnitude.

The history can be viewed many ways. One approach is to focus on particularly dramatic examples of disturbing mistreatment, such as a state supreme court's approval of excluding a child with cerebral palsy from public school because "his physical condition and ailment produces a depressing and nauseating effect upon the teachers and school children." *State ex rel. Beattie v. Board of Education*, 172 N.W. 153, 154 (Wis. 1919). These discriminatory attitudes and practices were not limited to a single region or group of states. *See, e.g.*, Noll, *Feeble-Minded in Our Midst: Institutions for the Mentally Retarded in the South, 1900-*

1940 (1995); Larson, *Sex, Race, and Science: Eugenics in the Deep South* (1995); Gallagher, *Breeding Better Vermonters: The Eugenics Project in the Green Mountain State* (1999).

Another approach to the history is to observe the numerous discriminatory provisions which have survived on the law books of the States, long past the time when more enlightened attitudes might have been expected to prevail.[4] One of the clearest examples of the durability of such discrimination is the fact that the exclusionary policies in the public schools exemplified in *Beattie*, *supra*, remained widespread in all 50 States until the enactment of the Education for All Handicapped Children Act by Congress in 1975, 89 Stat. 773, and the effects lingered far longer.

But perhaps the best means of gauging the breadth and virulence of the discrimination that has been visited upon citizens with disabilities is for this Court to recognize Congress' thorough documentation of the scope of the problem. Congress' awareness is evidenced not only by the legislative history of the ADA, but also from its experience

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[4] The reason for the durability of these discriminatory laws may be more complex than it appears at first glance. The natural tendency might be to explain them away as the consequence of mere legislative inattention, in the same way that some municipalities may still have ordinances on the books that prohibit the use of motor cars in any fashion that frightens horses. But the persistence of disability discrimination is not so benign. The fact that individuals with disabilities were locked away in distant institutions, that children with handicapping conditions were not allowed to attend public schools, that the state capitol building may have narrow doors and no ramp – these facts take on a life of their own. Even if society is no longer fully in the grip of eugenic fears, the legislative *products* of those fears continue to effect us. We come to accept *as the natural order of things* that schools are places reserved for mentally typical children, that people with disabilities are not encountered every day on the street, and that citizens seeking redress from their state government will be the kind of people who can make it through the capitol door.

with other statutes enacted in the preceding two decades to address aspects of disability discrimination.

D. The Discrimination Against People with Disabilities Is Not Merely Unfortunate or Disquieting, But Also Unconstitutional.

Under this Court's precedents, a discriminatory law can be found to be unconstitutional in several ways. One method would be a determination that the classification employed by the State is either suspect or semi-suspect. This Court declined to follow that route regarding people with mental retardation in *Cleburne*, and it gave no indication that it would view other disabilities differently.

The second method would be to subject the discriminatory laws to strict scrutiny when people with disabilities have been denied a fundamental right that is protected by the Constitution. States have frequently denied people with disabilities such rights. The most obvious are categorical or practical barriers to voting, deprivations of the rights of marriage, procreation, and parenthood. Just as clearly, laws subjecting innocent people with disabilities to institutionalization and residential segregation for eugenic or other purposes involve the fundamental right to physical liberty. *See United States v. Salerno*, 481 U.S. 739, 750 (1987); *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975). This Court has also made clear that there are substantive liberty interests retained even by individuals who have been lawfully institutionalized. *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982).

Amici recognize that correctly identifying such laws as involving the deprivation of fundamental constitutional rights does not end the inquiry. In some instances the State may be found to have a compelling governmental interest which can be accomplished by no less drastic means. But this Court has repeatedly explained that laws depriving individuals of

fundamental constitutional rights are *presumptively* unconstitutional, *see, e.g., Harris v. McRae*, 448 U.S. 297, 312 (1980). Surely Congress could rely on that presumption, at least as a starting point, particularly where it provided States with an opportunity to rebut the presumption by demonstrating that the requested accommodation was unreasonable.

The third route to determining that a discriminatory law would be unconstitutional is to test its validity under this Court's decision in *Cleburne*. From the perspective of Congress, this would yield more ambiguous results. The Court made clear that laws involving mental retardation were not presumptively invalid, but that they violated the Equal Protection Clause if they were reflective of "mere negative attitudes or fear" or were motivated by "[p]rivate biases." 473 U.S. at 448. Congress clearly concluded that "the continuing existence of unfair and unnecessary discrimination and prejudice" against people with disabilities, 42 U.S.C. § 12101(9), often reflected archaic and stereotyped notions about the appropriate role in society for people with disabilities. *Cf. Mississippi University for Women v. Hogan*, 458 U.S. 718, 725 (1982).

Taken together, the statutes and practices that implicate fundamental liberty interests and those that reflect outmoded biases and prejudices against people with disabilities are sufficiently connected to rights protected by the Constitution. Congress reasonably and appropriately concluded that it could address these problems under Section 5 of the Fourteenth Amendment.

E. Disability Discrimination Is Unique Because of the Central Role Played by the States in its Implementation.

In *Cleburne*, five Justices of this Court described the history of discrimination experienced by citizens with mental

retardation as "grotesque." 473 U.S. at 454 (Stevens, J. and Burger, C.J., concurring); 473 U.S. at 461 (Marshall, Brennan, and Blackmun, JJ., concurring in the judgment in part and dissenting in part).[5] The mistreatment, segregation, and discrimination acknowledged and deplored in those opinions did not primarily involve private action. What evoked the characterization "grotesque" was largely a history of abuse and mistreatment by governments, and, in particular, state governments. And to the extent that such ill-treatment and abuse rose to constitutional proportions, it is a history of unconstitutional *state* action.

Private individuals and organizations did not sterilize people with mental disabilities in pursuit of eugenic goals. Private schools were not primarily responsible for excluding students with disabilities from the American educational system. Nor did private organizations segregate people with mental disabilities into distant institutions and exclude and separate those citizens from their own communities. Prohibitions on marriage and barriers to voting and participation in the political process were erected and maintained by state governments alone.

Obviously, the States that produced this regime of discrimination were doing so at the behest of private advocates, who were fearful, mistrustful, and prejudiced about people with disabilities. Such private advocates often

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[5] *Compare* this Court's conclusion in *Kimel*, 120 S.Ct. at 645 (2000) ("Older persons, again, unlike those who suffer discrimination on the basis of race or gender, have not been subjected to a 'history of purposeful unequal treatment.'") (citations omitted) *with Olmstead v. L.C.*, 119 S.Ct. 2176, 2191 (1999) (Kennedy, J., concurring in the judgment) ("persons with mental disabilities have been subject to historic mistreatment, indifference, and hostility"). Justice Marshall chose a point of comparison from personal experience, and characterized the "regime of state mandated segregation and degradation" as rivaling "the worst excesses of Jim Crow." *Cleburne*, 473 U.S. at 462 (Marshall, J., concurring in the judgment in part and dissenting in part).

vehemently and passionately expressed their views about the need for governmental action. But governmental action is always the product of private advocacy; the laws that disadvantaged racial minorities and women were the product of similar advocacy by private citizens and organizations. As this Court has held, governments "may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic. 'Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.'" *Cleburne*, 473 U.S. at 448 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).[6] Among the unique features of disability discrimination is, unfortunately, the central role the States have played as the principal source of the evil that Congress sought to redress.

The central role of the States in the history of discrimination against people with disabilities stands in sharp contrast to other kinds of discrimination. For example, discrimination by States against elderly citizens is primarily a phenomenon of the private sector, and where public discrimination exists, it simply reflects private sector practices. *Kimel*, 120 S.Ct. at 649. Unlike age discrimination, gender and racial discrimination historically have featured a more important role for governmental actors, taking such forms as official disenfranchisement and state enforcement of segregation, and before that, slavery. But even for race and gender (except for disenfranchisement prior to the Nineteenth Amendment and the Voting Rights Act of 1965), the role of government was largely to buttress and reinforce private discrimination. Religious discrimination in our legal history, both anti-Semitism and anti-Catholicism, was also primarily the codification of intense private bias. By

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[6] Neither, of course, may the state "become the instrument for generating the prejudice and hostility" that disadvantaged groups encounter. *Rice v. Cayetano*, 120 S.Ct. 1044, 1057 (2000).

contrast, State mistreatment of people with disabilities has differed qualitatively from the kind of discrimination that nondisabled citizens committed in their private lives.

But just as the discrimination faced by people with disabilities is unusual in the central role played by State governments, it is even more distinctive because of the form that state action has taken. State mistreatment of people with disabilities has featured pervasive and systematic effort to exclude them from full citizenship in their own communities. Citizens consigned to lifelong confinement in distant residential institutions were not placed there because the State assumed that they would prefer the comforts of segregation to living in their own communities. *Cf. O'Connor v. Donaldson*, 422 U.S. at 575. The child in *Beattie*, *supra*, and untold thousands like her were not excluded from public school because of a belief that they would achieve citizenship more effectively without schooling. *Cf. Brown*, 347 U.S. at 493 ("[E]ducation . . . is required in the performance of our most basic public responsibilities. . . . It is the very foundation of good citizenship."). The individuals who were denied the right to marry or the opportunity to have children were not deprived of those liberties because the government thought they would lead happier lives without families.[7]

In each of these instances, the judgment was made *by the State* that society would be benefited if the people with

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[7] The eugenic motivation behind laws requiring sterilization is obvious. It may be less apparent, however, that similar motivation led to the barriers to marriage and consignment to residential institutions. *See, e.g., State v. Wyman*, 173 A. 155, 156 (Conn. 1934) (describing purpose of both statutory rape and marriage laws); *Lau v. Lau*, 122 A. 345, 346 (N.H. 1923) (purpose of marriage prohibition); Ala. Code 1975, § 22-52-51 (1997 repl.) ("Should the institution at any time not be able to accommodate all who should be admitted thereto under this section, preference in admission shall be given to children *and women of childbearing age*.") (emphasis supplied).

disabilities were removed from central aspects of ordinary civic life that are available to all other citizens.[8] States may have had a compelling justification for some instances of exclusion, but that is not the point. Crucially, each individual manifestation of state discrimination formed part of a larger pattern—the failure or refusal to recognize that citizens with disabilities were citizens first and people with disabilities second.

There is a further unique complexity regarding state discrimination against people with disabilities as it relates to private discrimination. Through residential segregation and school exclusion, as well as other means, the States *exacerbated* private discrimination. This was not merely a matter of ratifying or giving state imprimatur to private bias. Rather, the States, however inadvertently, promoted private discrimination by preventing ordinary day-to-day contact between nondisabled citizens and those who had disabilities. It is now widely understood that actual contact and interaction between individuals help to erode the barriers of prejudice. The States, by separating individuals with disabilities, fostered the survival of private prejudice by keeping people with disabilities apart, and mysterious, and *frightening*. Usually, the States are not responsible for giving

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[8] It is also true, of course, that the motivations of States have been neither completely monolithic nor unchanging over time. In some of the earliest (and most egregious) discriminatory laws, the motivation to protect society from people with disabilities may have been accompanied by at least the rationalization, and perhaps the belief, that the individuals would also benefit from their exclusion. In more recent times, the continuation of these practices may also have been partially grounded in altruistic motives. But Congress found that many of these rules were "overprotective," 42 U.S.C. § 12101(5), and the product of "stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society". 42 U.S.C. § 12101(7). *Cf. United States v. Virginia*, 518 U.S. 515, 532 (1996) ("equal opportunity to aspire, achieve, participate in and contribute to society based on their *individual* talents and capacities") (emphasis supplied).

individuals who have disabilities, their handicapping condition,[9] and thus the disability itself is not a product of state action. But the States impeded the acceptance of those citizens in the private sector by preventing the interaction that otherwise would have begun to dispel "archaic and stereotypic notions" and "simplistic, outdated assumptions" about the appropriate role of people with disabilities in our (and *their*) society. *See Mississippi University for Women v. Hogan*, 458 U.S. at 725-26.

As a result of all these considerations, discrimination against citizens with disabilities is surely an appropriate subject for Federal civil rights legislation.

II. CONGRESS ADDRESSED THIS CONSTITUTIONAL PROBLEM WITH EXTRAORDINARY CARE; AS A RESULT, THE ADA IS CONGRUENT WITH THE GUARANTEES OF THE FOURTEENTH AMENDMENT.

The fact that Congress investigated the problem exhaustively, and correctly concluded that people with disabilities were often the victims of unacceptable discriminatory treatment, does not end the inquiry. "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). This Court found that evaluation to be relatively straightforward in *Boerne* and *Kimel*. The analysis of the ADA is substantially more complex.

In order to determine whether Congress acted congruently with the constitutional problem it confronted, it is necessary to begin with the nature of constitutional violations by the

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[9] *But see Youngberg v. Romeo*, 457 U.S. 307, 327 (1982) (Blackmun, J., concurring) (state responsibility for the loss of skills resulting from the effects of institutionalization).

states against people with disabilities. *Amici* have already discussed the Equal Protection Clause. But unlike other forms of discrimination, State laws disadvantaging people with disabilities have implicated *all four* of the protections in Section 1 of the Fourteenth Amendment.[10]

A. States Have Consistently Deprived People with Disabilities of Liberty Interests Protected By the Due Process Clause.

Congress was fully aware that there was a persistent pattern of States depriving people with disabilities of fundamental liberty interests without adequate justification.

The most obvious category of liberty deprivation has been the States' institutionalization of people with disabilities, which Congress explicitly addressed in its findings in the statute. *See* 42 U.S.C. § 12101(2) and (3). As this Court has observed, freedom from physical confinement is at the heart of the liberties protected by the Due Process Clause. Confinement in a residential institution, whatever its purpose, has long been recognized as a "massive curtailment of liberty," *Humphrey v. Cady*, 405 U.S. 504, 509 (1970), "which severely diminishes the everyday life activities of individuals." *Olmstead v. L.C.*, 119 S.Ct. 2176, 2187 (1999). There is nothing in the nature of having a disability which makes that liberty less precious, nor its curtailment any less momentous.

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[10] Although this brief focuses on the Equal Protection, Due Process, and Citizenship Clauses, it is also true that the same State practices have interfered with the Privileges and Immunities of citizens with disabilities. While this clause has received a relatively narrow reading, it has been held to include the rights to travel between States, to enter Federal lands, and to participate in the Nation's political processes. It is indisputable that an individual who is locked up in a segregating institution because of a disability is deprived of those rights (among others) by his State, and Congress has the authority to redress those deprivations.

This "strong interest" in physical freedom, *see Foucha v. Louisiana*, 504 U.S. 71, 88 (1992) (O'Connor, J., concurring in part and concurring in the judgment), is compounded because such confinement of people with disabilities often carries with it further deprivations and intrusions into liberty interests. *Vitek v. Jones*, 445 U.S. 480, 492 (1980). But even the fact of confinement itself entails far-reaching consequences for the individual, including "loss of liberty to choose his own friends and companions, select daily activities, decide what to eat, and retain a level of personal privacy, among other things." *Heller v. Doe*, 509 U.S. 312, 341 (1993) (Souter, J., dissenting). Subjection to a sustained regimen of institutionalization, over time, often results in the atrophy and loss of the individual's *ability* to make such decisions regarding his or her own life. *Cf. Youngberg v. Romeo*, 457 U.S. 307, 327 (1982) (Blackmun, J., concurring).

The legacy of widespread State deprivations of the liberty interests of individuals with disabilities implicates Congressional authority under the Fourteenth Amendment in two distinct ways. The most obvious is that Congress sought to prevent such deprivations in the form of unnecessary confinement. *Olmstead*, 119 S.Ct. at 2185. Of equal importance, Congress had a restorative interest in assuring that people with disabilities received appropriate ameliorative assistance in overcoming the continuing effects of past liberty deprivations.

B. State Laws Have Had Both the Purpose and Effect of Depriving People with Disabilities of the Very Fact of Citizenship Itself.

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." This sentence is a central command of the Fourteenth Amendment.

The Citizenship Clause was included in the Amendment to ensure that States could not erect a caste system which disadvantaged those recently freed from slavery. *See Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Thus, its central purpose was not to protect travelers or ensure freedom of movement among the States. Rather, its purpose was to prohibit exclusion of citizens from the political community *by their own States*. *See generally*, Kettner, *The Development of American Citizenship, 1608-1870*, 341-51 (1978). And as the Court has recently observed, a State cannot "deem a class of persons a stranger to its laws." *Romer v. Evans*, 517 U.S. 620, 635 (1996).

One State law creating an institution of residential segregation defined its purpose as addressing "feeblemindedness, including idiocy, imbecility, and the higher grades and varieties of mental inferiority *which render the subjects unfit for citizenship*." Act of April 3, 1920, ch. 210, § 17, 1920 Miss. Laws 288, 294 (emphasis supplied). While this statute was unusual in the candor of its language, it accurately captured the spirit of laws that have discriminated against people with disabilities.

No other group of American citizens has faced systematic and total exclusion from our public schools. *Cf. Plyler v. Doe*, 457 U.S. 202 (1982). Seldom have groups of American citizens been deprived of their physical liberty for sustained periods of time solely because of accidents of birth. *Cf. Korematsu v. United States*, 323 U.S. 214 (1944). No other group of citizens has suffered under State laws that deprived them of the right to marry and have children without any predicate in the behavior of the individual. *Cf. Skinner v. Oklahoma*, 316 U.S. 535 (1942). Few other groups of citizens have been categorically excluded from jury service. *Cf. Strauder v. West Virginia*, 100 U.S. 303 (1880); *Ballard v. United States*, 329 U.S. 187 (1946). And when major groups of American citizens have been denied the right to vote, we

have found that fact so dissonant to our constitutional faith that we deemed it an appropriate occasion to amend the Constitution itself. *Cf.* U.S. Constitution, Amendments 15 and 19.

All of these rights are commonly understood to be badges and incidents of citizenship. Their cumulative denial is unique, at least in the twentieth century. Litigants disadvantaged by a particular statute frequently claim, sometimes hyperbolically, that it treats them as "second-class citizens." *Cf. Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 922 (1986) (O'Connor, J., dissenting). But it would be inaccurate to claim that discriminatory state laws treated people with disabilities as second-class citizens when it is difficult to discern what attributes of citizenship their States left them. The totality of the legal structure under which people with disabilities have lived has clearly sent them the message that they are outsiders, set apart, and are not, in any sense, full members of the political community. *Cf. Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

As this Court has memorably observed, "Citizens of the United States ... have the right to choose to be citizens 'of the state wherein they reside.' U.S. Const., Amdt. 14, § 1. *The States, however, do not have any right to select their citizens.*" *Saenz v. Roe*, 119 S.Ct. 1518, 1530 (1999) (emphasis supplied). Thus, no State can deny citizenship to a migrant from another state based on financial status. But just as clearly, a State cannot pick and choose among its residents, on the basis of physical or mental disability, those who will receive full recognition of American and State citizenship, and those who will not.

Congress was empowered, under Section 5, to guarantee the citizenship of people with disabilities.

III. THE CARE CONGRESS TOOK IN CRAFTING THE ADA PRODUCED LEGISLATION THAT IS PROPORTIONAL TO THE INTRACTABLE CONSTITUTIONAL PROBLEM POSED BY DISABILITY DISCRIMINATION.

The requirement that legislation enacted pursuant to Section 5 be "proportional" assures that Congress, even when it addresses a topic related to rights protected by the Fourteenth Amendment, does not overreach its authority. But there is nothing in the text or the history of Section 5 that invariably limits Congressional authority to minor legislative remedies. "Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *Kimel*, 120 S.Ct. at 648. Although the ADA is a relatively comprehensive civil rights statute, it is not disproportionate to the constitutional problems that required its enactment.

Congressional action under Section 5 must be remedial rather than substantive, which is to say that such legislation must enforce constitutional rights rather than create new ones. But "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States." *Boerne*, 521 U.S. at 518.

In enacting the ADA, Congress concluded that it was necessary to remove both public and private barriers that stood between people with disabilities and full citizenship. The fact that those barriers were both multiple and varied only clarified the necessity of enacting relatively comprehensive legislation. For example, viewed in isolation, it might or might not be held to violate the Constitution to hold elections in locations inaccessible to people with physical disabilities. But Congress could surely have concluded that requiring States, wherever possible, to

eliminate such barriers would enhance the ability of those citizens to secure "nondiscriminatory treatment by government" in the "provision or administration of governmental services." *See Katzenbach v. Morgan*, 384 U.S. 641, 652 (1966); *Boerne*, 521 U.S. at 528. This is especially true when Congress found such discrimination to be particularly pervasive. *Cf. Morgan*, 384 U.S. at 653.

The proportionality of Congress' response to the constitutional problem it confronted is made even clearer by the scope of the remedies and defenses it provided. The structure of the ADA in some ways resembles that of the Civil Rights Act of 1964; yet in provision after provision, Congress carefully tailored the statute's reach to the particular contours of the unique constitutional problems presented by disability discrimination. The provisions requiring only "reasonable accommodations" and exemption of adaptations which "would impose an undue hardship" on covered entities evidence Congress' concern to avoid overreaching.

Congress clearly sought to strike a balance between two important goals. The first was removing the State-created and State-maintained barriers to full community participation by people with disabilities. The second goal, equally apparent on the face of the statute, was limiting the level of adaptation and expense that States would be required to undertake in pursuit of the first objective. *See generally Olmstead*, 119 S.Ct. at 2188-90. The congressional reconciliation of these two goals recognized that while there are "real and undeniable differences" between citizens with disabilities and nondisabled individuals, *see Cleburne*, 473 U.S. at 444, these factual differences do not justify many forms of State discrimination. Much of that discrimination was the product of archaic views about the proper role of citizens with disabilities in society. *Id.*, 473 U.S. at 448.

Congress did not strike this crucial balance casually or heedlessly. Its considered judgment merits respectful deference in this Court.

IV. THE RESPECTIVE ROLES OF THIS COURT AND THE CONGRESS IN ENFORCING THE RIGHTS OF PEOPLE WITH DISABILITIES MUST REFLECT THE UNIQUE CHARACTER OF DISABILITY DISCRIMINATION.

The heart of the ruling in *Boerne* was the constitutionally mandated separation of powers between Congress and this Court. 521 U.S. at 536. This case also involves that same constitutional equilibrium, but the unique character of disability discrimination, and the nature of the ADA, suggest a very different analysis.

When Congress enacted the Religious Freedom Restoration Act (RFRA), its express purpose was to overturn this Court's constitutional judgment on the scope of the Free Exercise Clause. Although individual Members of the Court differed sharply on the appropriateness of the balance which had been struck in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), there was broader agreement that Congress lacked the constitutional authority to reject this Court's judgment.

By contrast, the ADA was hardly a reflexive attempt by Congress to overturn this Court's decision in *Cleburne* or any other case. Rather, it constituted a reasoned step in a course of careful legislative experimentation, which sought to bring individuals with disabilities into full enjoyment of American citizenship. *See Olmstead*, 119 S.Ct. at 2186 ("The ADA stepped up earlier measures to secure opportunities" for people with disabilities.) In the two decades preceding the enactment of the ADA, Congress had legislated to prevent discrimination by recipients of Federal funds, abolish the

exclusion of students with disabilities from public schools, and promote the provision of adequate services and the protection of the rights of citizens with disabilities.[11]

By 1990, Congress concluded that these piecemeal efforts, as important as they had been and continue to be, were insufficient to disassemble the barriers to full citizenship. It therefore enacted a more comprehensive statute, modeled in part on the Civil Rights Act of 1964 which had played a crucial part in the effort to bring another excluded segment of our nation's population into full citizenship.

Congress found an egregious history and a pervasive, continuing problem of State exclusion of people with disabilities from full citizenship. It knew that the tenacity of this exclusion resulted from the persistence of discriminatory practices. Those practices derived from (and reinforced) archaic and stereotypical views of the appropriate roles for those individuals in society. Indeed, in some cases they reflected a belief that people with disabilities should have no real role at all, or at most, a role defined by segregation and severely limited opportunities. Faced with this record, what was Congress supposed to do?

The alternatives open to Congress were, in fact, quite limited, if it wanted a solution to this pervasive problem. One possibility would be to continue the piecemeal approach, hoping that by addressing exclusion from citizenship in bits and pieces, incremental progress could be achieved. But Congress had already learned the limitations of that approach in the context of disability discrimination, just as it had known that the elimination of the racial caste system could

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[11] *E.g.* Section 504 of the Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394; Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773; Developmentally Disabled Assistance and Bill of Rights Act, Pub. L. No. 94-103, 89 Stat. 486 (1975); Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 94 Stat. 349 (1980).

not be accomplished by isolated steps (*e.g.*, "this year we'll desegregate drinking fountains").

Another approach would be to enact its protections for limited times, or in limited regions of the country, or allow enforcement upon an individualized showing of particularly outrageous facts. But this Court has made clear that while "termination dates, geographic restrictions, or egregious predicates" may be indicia of proportionality in some cases, they are not a requirement for the exercise of the authority granted by the Fourteenth Amendment. *Boerne*, 521 U.S. at 533. In the case of disability discrimination, they clearly would not have been effective or appropriate.

A third possibility would have been to address private discrimination alone, and leave the States beyond the law's reach. The fatal flaw in this approach is that it ignores the central role of the States in creating and perpetuating the exclusion. Full citizenship could not be guaranteed merely by requiring franchise restaurants to install ramps.

The final possible approach would have been to do nothing at all, hoping that State barriers to full citizenship might somehow eventually erode.

This Court's teachings on the scope of the Fourteenth Amendment do not require Congress to limit itself to these ineffectual responses.

As the Court has made clear, "It is for Congress in the first instance to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference." *Kimel*, 120 S.Ct. at 644. Such deference is particularly warranted when Congress exercises its constitutional authority with care and circumspection. In enacting the ADA, Congress found that a Federal civil rights statute was necessary both to remedy and to prevent the obstacles faced by people with disabilities in their quest for full citizenship. It recognized "the necessity of

using strong remedial and preventive measures to respond to the widespread and persisting deprivation of constitutional rights" produced by this country's "grotesque" history of discrimination against people with disabilities. *Cf. Boerne*, 521 U.S. at 526; *Cleburne*, 473 U.S. at 454 (Stevens, J., concurring). It crafted the law carefully, mindful both of the scope of the barriers faced by people with disabilities, and of the need to avoid placing unreasonable burdens on the States. In short, it acted constitutionally.

CONCLUSION

For these reasons, *amici* urge affirmance of the judgment of the Court of Appeals.

Respectfully submitted,

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August, 2000

APPENDIX

APPENDIX

THE AMERICAN ASSOCIATION ON MENTAL RETARDATION (AAMR) is the Nation's oldest and largest interdisciplinary organization of professionals in the field of mental retardation. Founded in 1876, AAMR has appeared as *amicus curiae* before this Court in numerous cases, including *City of Cleburne v. Cleburne Living Center.*

THE ARC OF THE UNITED STATES (formerly the Association for Retarded Citizens of The United States), through its nearly 1,000 state and local chapters, is the largest national voluntary organization in the United States devoted solely to the welfare of the more than seven million children and adults with mental retardation and their families. Since its inception, the Arc has vigorously challenged attitudes and public policy, based on false stereotypes, that have authorized and encouraged segregation of people with mental retardation in virtually all areas of life. The Arc was one of the leaders in encouraging passage of the Americans with Disabilities Act (ADA).

THE BRAIN INJURY ASSOCIATION, Inc., is a national, non-profit organization dedicated to brain injury prevention, research, education, and advocacy on behalf of persons with brain injuries. It serves persons with brain injury, their families and caregivers in all 50 states.

THE JOSEPH P. KENNEDY, JR. FOUNDATION, established in 1946, has as its objectives the prevention of mental retardation and the improvement of the way in which society deals with persons who have mental retardation.

THE NATIONAL COUNCIL FOR COMMUNITY BEHAVIORAL HEALTHCARE is the Nation's largest membership organization dedicated to ensuring appropriate and affordable community mental health and addiction services. Its membership includes providers of inpatient, outpatient, and residential care; partial hospitalization

programs; psychiatric rehabilitation services; state and local policy advocates; and managers of state and county systems of care.

AMERICAN PSYCHIATRIC NURSES ASSOCIATION (APNA) provides leadership to advance the psychiatric mental health nursing profession, and works to shape health policy for the delivery of mental health services. The APNA is concerned about discrimination experienced by people with disabilities, particularly individuals with mental illness, and works to help gain community acceptance of individuals with disabilities.

THE INTERNATIONAL ASSOCIATION FOR PSYCHOSOCIAL REHABILITATION SERVICES is dedicated to the promotion, protection, and improvement of services that facilitate the adjustment of persons with psychiatric disabilities into communities. Its members include agencies, mental health practitioners, policy makers, family groups, and consumer organizations.

(31)

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United States

OCTOBER TERM, 1999

UNIVERSITY OF ALABAMA AT BIRMINGHAM
BOARD OF TRUSTEES, et al.,
Petitioners,

v.

PATRICIA GARRETT, et al.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF *AMICUS CURIAE* OF PARALYZED VETERANS OF AMERICA, NATIONAL ORGANIZATION ON DISABILITY, NATIONAL MENTAL HEALTH ASSOCIATION AND NATIONAL ALLIANCE FOR THE MENTALLY ILL ON BEHALF OF RESPONDENTS

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I.
INTERESTS OF THE AMICI

The Paralyzed Veterans of America ("PVA") is a Congressionally chartered non-profit veterans service organization whose members are honorably discharged veterans of military service with spinal cord injury or dysfunction.[1] PVA has advocated for civil rights and equal opportunities for people with disabilities since its inception in 1947. PVA members, virtually all of whom use wheelchairs, are active citizens with a significant interest in full and equal access to state programs and services.

The National Organization on Disability ("N.O.D.") promotes the full and equal participation of America's 54 million men, women and children with disabilities in all aspects of life. N.O.D. was founded in 1982 at the conclusion of the United Nations International Year of Disabled Persons. Funded entirely by private sector contributions, N.O.D. is the only national disability network organization concerned with all disabilities, all age groups and all disability issues.

The National Mental Health Association, is a national organization with over 330 affiliates dedicated to promoting mental health, preventing mental disorders, and achieving victory over mental illness, as well as respect, dignity, and opportunities for persons with disabilities.

The National Alliance for the Mentally Ill, with more than 200,000 members and 1,200 state and local affiliates, is the nation's leading grassroots advocacy organization dedicated exclusively to improving the lives of persons with severe mental illnesses, including schizophrenia, bipolar disorder (manic-depressive illness), major depression, obsessive-compulsive disorder, and severe anxiety

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[1] This brief was written entirely by counsel for *amici*, and no counsel for any party had any role in authoring this brief. No monetary contributions were made by any outside parties to the preparation or submission of this brief. All parties have given written consent to the filing of this brief.

disorders.

II.
INTRODUCTION AND SUMMARY OF ARGUMENT

A little girl looks at photographs of children spread out in front of her and divides them into three piles: "They're girls, they're boys and they're handicaps."[2] A disability rights activist dressed in a business suit sits in a wheelchair at the airport awaiting her flight, while another businesswoman walks up and drops a quarter in her coffee cup.[3] A 17-year old mentally retarded girl has a baseball bat and a broom handle brutally rammed into her vagina by four high school football players in the affluent suburb of Glen Ridge, New Jersey, while nearly a dozen other students watch on and do nothing to stop it.[4] A 66-year old double amputee, perched atop a baggage cart "like a sack of potatoes," is wheeled onto a plane and left there for 45 minutes by airline personnel while other passengers stare at him; an airline representative then tells his daughter, "If he's that sick, he shouldn't be on a plane; he should be in a hospital."[5] Jerry Lewis, the long-time host of the Muscular Dystrophy Telethon, writes in a national magazine in 1990 that he would only be "half a person" if he had the disease.[6]

Those are not isolated or antiquated anecdotes drawn from the far outreaches of American society; they exemplify mainstream culture, and vividly illustrate that broad prejudices against persons with disabilities survive at the threshold of the new millennium. Voluminous scientific

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[2] Rupert Brown, *Prejudice: Its Social Psychology* 119 (1995), *quoting* Pam Maras, *The Integration of Children with Disabilities into the Mainstream* 140 (1993) (unpub. Ph.D. thesis, University of Kent (Canterbury, UK)).

[3] Joseph P. Shapiro, *No Pity: People with Disabilities Forging a New Civil Rights Movement* 19 (1994).

[4] Barbara Kantrowitz, *Verdict After a Day of Horror*, Newsweek, Mar. 29, 1993, at 27.

[5] *Airline Workers Manhandle, Abuse Handicapped Passenger*, L.A. Times, Jan. 15, 1989, at 3.

[6] Jerry Lewis, *If I Had Muscular Dystrophy*, Parade, Sept. 2, 1990, at 4, 5.

research shows that those prejudices, infecting both the public and private sectors of American society, determine the way "non-disabled" people view and act toward people with disabilities.

Many persons, however, still fail to recognize the pervasive and damaging nature of disability prejudice. Accordingly, in support of Respondents Ash and Garrett, *amici* respectfully submit this brief: (i) to examine the deep-seated psychological and sociological mechanisms that give rise to prejudice against persons with disabilities; and (ii) to demonstrate some of the ways in which those prejudices have had tangible and substantial adverse impacts on the lives of persons with disabilities.

The Americans with Disabilities Act's ("ADA") legislative history demonstrates the *fact* of discrimination against persons with disabilities - by both public and private actors. Persons with disabilities have been subjected to a long history of "purposeful unequal treatment"[7] in areas such as employment, marital and procreational rights, residency, education and health care. Some of the more extreme forms of discrimination - such as the mandatory sterilization and institutionalization laws enacted in the name of "scientific progress" at the height of the eugenics movement - now stand exposed as lamentable artifacts of irrational prejudices. Significant discrimination persists, however, often concealed beneath the same façade of rationality that camouflaged the blatant rights violations of the early 20th Century.

Responding to that continuing discrimination, Congress enacted the ADA. It relied upon a body of psychological and sociological research showing that a number of mechanisms cause people, consciously or unconsciously, to form negative attitudes toward persons with disabilities, based not upon verifiably different

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[7] *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

abilities, but upon myth.[8] Congress further understood that those who discriminate against persons with disabilities often characterize their conduct as an appropriate response to the very condition conferring minority status (*i.e.*, the individual's functional impairment). Accordingly, it required that adverse conduct against qualified persons with disabilities - whether committed by public or private actors - be shown to be based upon actual differences, rather than mere prejudices.

The psychological and sociological literature demonstrates that Congress's application of the ADA to the states was not only rational, but necessary. The concepts of "handicap" and "disability" do not exist *in vacuuo*; the significance of those labels derives from a person's physical and social environment. All Americans, including state actors, build and form that environment. All Americans, including state actors, are subject to the sociological mechanisms discussed herein, are susceptible to prejudicial attitudes, and are members of the society inhabited by persons with disabilities. Legislation intended to remedy and deter broad societal discrimination against persons with disabilities, therefore, necessarily must apply broadly to all American individuals and institutions, including the states.

III.
ARGUMENT

A. The Roots Of Societal Prejudice Against Persons With Disabilities

It is recognized in the fields of sociology and psychology that a variety of psychological and sociological mechanisms - including stereotyping, stigmatization, psychological discomfort, and paternalization - cause unimpaired individuals to hold prejudices against persons with disabilities. As shown below, while some or all of

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[8] U. S. Comm'n on Civil Rights, Accommodating the Spectrum of Individual Abilities 17, 25 (1983) (hereinafter "Accommodating the Spectrum").

these mechanisms also contribute to discrimination against other minority groups, their operation in the context of disability has unique characteristics that make disability prejudice extremely difficult to identify and eradicate.

1. Negative Stereotyping

Stereotyping - the belief that most or all members of a particular group share certain negative characteristics - underlies prejudice against persons with disabilities as well as racial, religious, ethnic and gender discrimination. However, while stereotyping of other minorities has become less acceptable since passage of the civil rights legislation of the 1960's and 1970's, stereotypes of persons with disabilities remain prevalent. For example, although few employers today likely would articulate a view that members of certain racial or ethnic minorities are not intelligent enough to hold some jobs, many freely express the view that people with disabilities display inordinate absenteeism, even though this stereotype has been thoroughly refuted by the empirical data.[9]

The persistence of disability stereotypes is attributable to the fact that, in contrast to race and ethnicity, which are generally recognized to bear no relation to an individual's abilities, the mere fact of having a disability is still believed to convey important information about a person's potential and limitations beyond the particular disability itself.

Of course, the existence of a disability is not wholly irrelevant to a person's capabilities. Any disability constitutes an impairment that imposes certain burdens and

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[9] *See, e.g.*, Jack R. Ellner & Henry E. Bender, *Hiring The Handicapped: An AMA Research Study* 46 (1980) ("Absenteeism is mistakenly assumed to be higher among handicapped employees"); George E. Stevens, *Exploding the Myths About Hiring the Handicapped*, Personnel, Dec. 1986, at 57, 58-60; (debunking various myths about employment performance of persons with disabilities, including claims of excessive absenteeism).

restrictions on an individual's life activities.[10] The perception of *disabilities* as negative limitations, however, often irrationally leads to negative attitudes towards *those persons who have them*, because "[p]eople tend to think in terms of a handicapped person rather than a person who is handicapped. It is imagined or perceived that [the disability] is the central life experience of that person and influences *all* his other mental and social abilities."[11]

For many people, the myriad characteristics by which one judges a non-disabled person – integrity, responsibility, sense of humor, amiability, sensitivity, to name just a few – suddenly recede into the background when the person has a disability. Instead, a single attribute comes to the fore: "an uncommon characteristic is chosen as the most significant feature. This deviant characteristic becomes the focus of attention, and most reactions can then be phrased in terms of that single feature."[12]

When a person's entire being is thus reduced to what is perceived to be a negative characteristic – her physical or mental impairment – attitudes about the individual's capabilities in other areas also tend to become negative. This effect has been described as the "spread" phenomenon.

> [t]he nondisabled tend to create consistently and on the whole usually negative

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10 *See* 42 U.S.C. § 12102(2)(A) (1995) (defining "disability" for purposes of the ADA as a physical or mental impairment that substantially limits one or more major life activities).

11 Duane F. Stroman, *The Awakening Minorities: The Physically Handicapped* 52 (1982) (emphasis added).

12 Myron G. Eisenberg, *Disability as Stigma, in Disabled People as Second-Class Citizens* 3, 5 (Myron G. Eisenberg et al. eds., 1982); *see also* Constantina Safilios-Rothschild, *The Sociology and Social Psychology of Disability and Rehabilitation* 111 (1970) ("most of the time the disabled are discriminated against by the nondisabled because the assessment stops at the recognition of the presence of the disability. This process of stereotyping and using stereotypes as guidelines for behavior simplifies interaction for the nondisabled when they encounter disabled persons, but often leads to the unjust treatment of the latter").

> impressions about the disabled person, who is then necessarily viewed as inferior in terms of all possible attributes simply on the basis of his visible or known but nonvisible disability.[13]

A number of empirical studies have demonstrated "spread" at work in influencing the attitudes of the unimpaired toward persons with disabilities. People mistakenly link epilepsy to physical unattractiveness.[14] They shout at the blind as if they are deaf and try to lift them as if they are orthopedically disabled.[15] They erroneously assume that persons with physical disabilities are mentally impaired,[16] and that persons with psychiatric conditions are violent.[17] They speak to persons with physical disabilities as if they were children.[18] In short, merely from knowledge of the existence of one impairment,

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[13] Safilios-Rothschild, *supra*, at 123; *see also* Beatrice A. Wright, *Physical Disability: A Psychological Approach* 32-39 (Kathy Robinson & Eleanor Castellano eds., 2d ed. 1983) (discussing "spread" phenomenon).

[14] Robert O. Hansson & Beverly J. Duffield, *Physical Attractiveness and the Attribution of Epilepsy*, 99 J. Soc. Psychol. 233, 233-40 (1976).

[15] Alan G. Gowman, *The War Blind in American Social Structure* 198 (1957).

[16] Wright, *supra*, at 35.

[17] *Compare, e.g.*, Bruce G. Link et al., *The Social Rejection of Former Mental Patients: Understanding Why Labels Matter*, 92 Am. J. Soc. 1461, 1494 (1987) (in study examining the effects of labeling individuals as having been previously hospitalized for mental illness, evidence indicated "that a meaningful segment of the public sees former patients as dangerous and expresses a reluctance to interact with them") *with* John Monahan, *Mental Disorder and Violent Behavior: Perceptions and Evidence*, 47 Am. Psychol. 511, 519 (1992) (concluding, upon review of relevant literature, that "[m]ental health status makes at best a trivial contribution to the overall level of violence in society").

[18] James J. Liesener & Judson Mills, *An Experimental Study of Disability Spread: Talking to an Adult in a Wheelchair Like a Child*, 29 J. Applied Soc. Psychol. 2083, 2090-92 (1999); *see also* Wm. Drew Gouvier et al., *Verbal Interactions with Individuals Presenting with and without Physical Disability* 39 Rehabilitation Psychol. 263-68 (1994) (individuals asked directions by persons with disabilities responded with simple language more appropriate to interactions with children).

many people form negative attitudes about other unrelated characteristics of persons with disabilities.[19]

2. Stigmatization

Disability also carries the taint of social stigma. As the sociologist Erving Goffman noted in his seminal work, the process of stigmatization reduces those so classified to non-human status:

> The attitudes we normals have toward a person with a stigma, and the actions we take in regard to him, are well known, since these responses are what benevolent social action is designed to soften and ameliorate. By definition, of course, we believe the person with a stigma is not quite human.[20]

Stigmatization is a common ingredient of most brands of prejudice. However, persons with disabilities have arguably been subjected to more severe historical stigmatization than other minorities.

Deviance from physical or mental norms has long been linked with deviance from moral norms. The Bible begins with the tale of Cain's being physically "marked" as punishment for killing Abel, and continues with numerous other stories associating disability and disfigurement with sin.[21]

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19 Stereotyping places persons with disabilities in a Catch-22 situation. Stereotypical attitudes lead to their being segregated from the rest of society, and that segregation, in turn, is used as confirmation of the truth of the stereotypes. "The able-bodied person sees that handicapped people rarely hold good jobs, become culture heroes, or are visible members of the community and concludes that this is 'proof' that they cannot hold their own in society." John Gliedman & William Roth, *The Unexpected Minority: Handicapped Children in America* 22 (1980).

20 Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* 5 (1963).

21 *See* Shapiro, *supra*, at 30 ("In the Old Testament, being blind, lame, deaf, crippled, sick, or diseased is a sign of having done something to incur God's disfavor. Disability is brought on by sin. In the New

Similar associations permeate secular Western literature, in which "bodily intactness and glowing health [have been] almost exclusively characteristics of the good and noble, while physical infirmities are reserved for the evil and malevolent."[22] We grow up hearing tales of disabled and wicked characters such as Rumpelstiltskin, Captain Hook, Long John Silver, or the dwarves, giants and gnomes in the Brothers Grimm fairy tales.[23] In adult literature, the common literary device of "the twisted mind in the twisted body," appears in as exalted a writer as Shakespeare, who depicted Richard III as a hunchback in order to provide a physical embodiment of his supposedly warped soul.[24] Captain Ahab's body-length scar and wooden leg serve as convenient metaphors for his traumatized and monomaniacal character in *Moby Dick*.

The 20th Century's patina of technology did not erase the linkage between sin and disability.

> Many of the ancient myths and stereotypes of people with disabilities still exist. Although few persons currently subscribe to abandoning or killing people with disabilities, many do associate disabilities with sin and the Devil. They either

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Testament, people with disabilities are cursed or possessed by evil."); Nancy Weinberg & Carol Sebian, *The Bible and Disability*, 23 Rehabilitation Counseling Bull. 273, 273-81 (1980) (reviewing associations of disability and sin in both Old and New Testaments).

[22] Shari Thurer, *Disability and Monstrosity: A Look at Literary Distortions of Handicapping Conditions*, 41 Rehabilitation Literature 12, 12 (1980).

[23] *See* Susan E. Roush, *Health Professionals as Contributors to Attitudes Toward Persons With Disabilities*, 66 Physical Therapy 1551, 1552 (1986) ("A collection of pictures taken from fairy tales and other children's stories reveals the connection between disability and evil as overwhelming.").

[24] Howard Margolis & Arthur Shapiro, *Countering Negative Images of Disability in Classical Literature*, Eng. J., Mar. 1987, at 18, 19. In fact, Richard III most likely had no disability. *Id. citing* B. Rogers, *Richard III: Shakespeare Was Quite Wrong*, 33 In Britain 31-35 (1978); *see also* Charles Ross, *Richard III* 139 (1981) ("[t]here is no reliable evidence for the popular Tudor idea that [Richard] was hunchbacked").

> consciously or subconsciously think that *disability* is a synonym of *bad*. More often than not, *able-bodied* is associated with *good*, i.e., Christ and the angels, cleanliness, and virtue.[25]

In contrast to the past when priests, rabbis, shamans and storytellers popularized the link between disability and sin, the contemporary purveyors of disability stigma are most commonly the news and entertainment media. In newspapers, magazines, books, plays, films and television programs, persons with disabilities "are often portrayed as evil, or as pitiable victims doomed to an unsatisfying life, or in an array of other roles that in the main tend to strengthen prejudices, fear, and loathing among audiences."[26]

Examples abound. In the 1960's, movie audiences watched the metal-handed Dr. No try to kill James Bond, the ideal physical specimen; those who stayed at home got to see a "hunchbacked dwarf," Migelito Loveless, try to kill dashing Jim West of *The Wild, Wild West*, because he had grown "weary of the sight of [his] strong, straight body."[27] The prosthetic-armed, wheelchair-confined Dr. Strangelove

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[25] George Henderson & Willie V. Bryan, *Psychological Aspects of Disability* 8 (1984) (emphases in original).

[26] Jack A. Nelson, *Broken Images: Portrayals of Those with Disabilities in American Media, in The Disabled, the Media, and the Information Age* 1, 1 (Jack A. Nelson ed., 1994); Paul K. Longmore, *Screening Stereotypes: Images of Disabled People*, Soc. Pol'y, Summer 1985, at 31, 33 (media depictions express "the notion that disability involves the loss of an essential part of one's humanity"); Robert Bogdan et al., *The Disabled: Media's Monster*, Soc. Pol'y, Fall 1982, at 32, 32 ("By linking ugliness and physical and mental differences with murder, terror, and violence, the media creates, at the same time as it perpetuates, society's prejudices - prejudices that result in fear of the handicapped and, ultimately, in their systematic, intentional exclusion from society."); National Mental Health Association, Stigma Matters: Assessing the Media's Impact on Public Perception of Mental Illness 24-25 (2000) (approximately half of survey respondents reported "often" seeing persons with mental illness portrayed in the media as addicts or criminals).

[27] Longmore, *supra*, at 32.

was a madman who preached lovingly about "the bomb." The "one-armed" man - not identifiable by any other attribute - was the real killer of Dr. Kimble's wife in *The Fugitive*. More recently, in the original *Star Wars* trilogy, Darth Vader, a murderous supervillain, spoke through a respirator.

As Martin Norden observed in his exhaustive study of the cinematic portrayals of persons with physical disabilities, these characterizations and others too numerous to mention "enhance[] the disabled characters' isolation and 'Otherness' by reducing them to objectifications of pity, fear, scorn, etc. - in short, objects of spectacle - . . . and [foster] a sense of isolation and self-loathing among audience members with disabilities."[28]

Nor are such attitudes limited to physical disabilities. Several studies have reported the widespread negative portrayals of persons with mental disabilities in the media.[29] A recent survey indicated that 40% of adults believe mental illness to be caused by character flaws and personality defects.[30] A slew of comedies in the past five

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[28] Martin F. Norden, *The Cinema of Isolation: A History of Physical Disability in the Movies* 2 (1994).

[29] *See, e.g.*, Otto F. Wahl & Rachel Roth, *Television Images of Mental Illness: Results of a Metropolitan Washington Media Watch*, 26 J. Broadcasting 599, 603-04 (1982) (in month of prime time television programming, majority of mentally ill characters were depicted as "aggressive," "confused," and lacking social connections; many were also portrayed as "dangerous" and "unpredictable"); George Gerbner, *Dreams That Hurt: Mental Illness in the Mass Media*, Proc. First Int'l Rosalynn Carter Symp. on Mental Health Pol'y 8, 11 (1985) (more than 70 percent of all mentally ill characters in prime-time drama and two-thirds of characters with mental illnesses on daytime soap operas are depicted as violent).

[30] Dolores Kong, *Widespread Misperception on Mental Illness*, Boston Globe, Oct. 1, 1997, at B1; Mary E. Fraser, *Educating the Public About Mental Illness: What Will it Take to Get the Job Done*, Innovations & Res., Issue 3, 1994, at 29-31 (in telephone interview of Utah residents, 71% of respondents believed that "serious mental illness is caused by emotional weakness," and 35% believed that mental illness is caused by "sinful behavior").

years have presented persons with mental disabilities as objects of ridicule.[31] Just last year, the United States Surgeon General decried the continuing stigmatization of persons with mental disabilities:

> Stigmatization of people with mental disorders has persisted throughout history. It is manifested by bias, distrust, stereotyping, fear, embarrassment, anger and/or avoidance. . . . It reduces patients' access to resources and opportunities (*e.g.*, housing, jobs) and leads to low self-esteem, isolation, and hopelessness. . . . In its most overt and egregious form, stigma results in outright discrimination and abuse. More tragically, it deprives people of their dignity and interferes with their full participation in society.[32]

The Holocaust, which began with attacks on the physically and mentally disabled,[33] provides a paradigm for the phenomenon that, when a group is perceived as morally repugnant, accursed, or subhuman, disparate treatment comes to be viewed not only as inoffensive, but as morally appropriate. Perceptions of "otherness" in this country have generated "reactions of pity, helplessness, distrust, uneasiness, and fear" in members of the non-impaired population, which, "in turn, serve as potent barriers to the participation of disabled persons in many forms of social activity."[34] For this reason, Congress justifiably concluded

[31] *See, e.g., Something About Mary* (1998) and *Scary Movie* (2000) (mental retardation); *Me, Myself and Irene* (2000) (multiple personality disorder).

[32] U.S. Public Health Service, Dep't of Health & Human Services, Mental Health: A Report of the Surgeon General 6 (1999).

[33] Marta Aussell, *Beyond Ramps: Disability at the End of the Social Contract* 20-28 (1998); Mark Mazower, *Dark Continent* 98 (1998).

[34] Advisory Comm'n on Intergovernmental Relations, Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal 20 (1989) (hereinafter "Disability Rights Mandates").

that "our society is still infected by the ancient, now almost subconscious assumption that people with disabilities are less than fully human. . . ."[35]

3. Psychological Discomfort

While stereotyping and stigmatization reflect cognitive constructs regarding persons with disabilities, a third contributor to prejudice against such persons is an affective phenomenon - the feelings of discomfort, embarrassment, or repugnance that some persons experience when interacting with persons with disabilities. Empirical studies show that unimpaired persons encountering persons with disabilities frequently experience such psychological uneasiness, which often manifests itself in restricted or inhibited behavior.[36]

Researchers have offered a number of explanations for such negative reactions to persons with disabilities. For some individuals, such reactions reflect embarrassment or awkwardness in not knowing the proper mode of social intercourse with someone with a disability.[37] For others,

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[35] Senate Comm'n on Labor and Human Resources, Report on the Americans with Disabilities Act of 1989, S. Rep. No. 101-116, at 8-9 (1989).

[36] *See, e.g.*, Robert Kleck et al., *The Effects of Physical Deviance Upon Face-To-Face Interaction*, 19 Hum. Rel. 425, 433-35 (1966) (subjects asked to interview person with apparent disability were more restricted in their communication, expressed views less representative of their actual beliefs, and terminated interviews sooner than when interviewing same person appearing without disability); Robert Kleck, *Physical Stigma and Nonverbal Cues Emitted in Face-To-Face Interaction*, 21 Hum. Rel. 19, 26-27 (1968) (subjects demonstrated inhibited physical gestures when interacting with physically disabled person); Robert Kleck, *Physical Stigma and Task Oriented Interactions*, 22 Hum. Rel. 53, 54, 59 (1969) (finding that unimpaired persons maintain greater physical distance when teaching *origami* to persons with disabilities); Fred Davis, *Deviance Disavowal: The Management of Strained Interaction by the Visibly Handicapped*, 9 Soc. Probs. 120, 123 (1961) (interactions with persons with disabilities evoke "strain and tension" on the part of persons without disability).

[37] Henderson & Bryan, *supra*, at 32 ("encountering someone who has a disability represents an unfamiliar situation for those who do not have disabilities," which can lead to "anxiety and withdrawal").

anxiety results from the perception of a person with a visible disability as "a kind of talisman, a visible incarnation of death . . . sexuality, and dependency. . . ."[38] As one author described this phenomenon:

> [U]pon encountering a physically disabled individual, the non-disabled person is reminded of his or her inevitable death, a reminder that is certain to be accompanied by a heightened state of anxiety. This anxiety reaction results in a psychological, as well as a physical, rejection of disabled individuals.[39]

In one experiment, subjects were presented with the choice of interacting with persons with values either similar to or different from their own. When presented with unimpaired individuals, the subjects chose to interact with persons having similar values; however, when the choices involved persons presented as having recently suffered a nervous breakdown, the subjects chose to interact with those persons most *unlike* themselves. The study concluded that these choices reflected the subjects' desire to alleviate anxiety about their own possible future emotional disturbance by associating such disability with individuals fundamentally different from themselves.[40]

Finally, on the most superficial level, feelings of discomfort toward persons with visible disabilities may result from nothing more than the belief, in a society that deifies physical beauty, that disability is simply "displeasing

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[38] Gliedman & Roth, *supra*, at 374.

[39] Hanoch Livneh, *Death Attitudes and Their Relationship to Perceptions of Physically Disabled Persons*, J. Rehabilitation, Jan.-Mar. 1985, at 38, at 38, 38; Jo E. Endres, *Fear of Death and Attitudinal Dispositions Toward Physical Disability*, 39 Dissertation Abstracts Int'l 7161A (1979) (study indicating that negative attitudes toward disability are positively correlated to fear of death).

[40] David W. Novak & Melvin J. Lerner, *Rejection as a Consequence of Perceived Similarity*, 9 J. Personality & Soc. Psychol. 147, 151 (1968).

or distasteful."[41]

Importantly, however, psychological discomfort is by no means limited to persons with visible physical disabilities. To the contrary, surveys show that the public feels *more* uncomfortable towards persons with mental illness than towards persons with other types of disability.[42]

Whatever the root cause of discomfort in unimpaired persons when interacting with a person with a disability, those feelings can, consciously or unconsciously, lead to segregation and isolation. A carefully-designed sociological study indicated that, when unimpaired people can disguise their motives, they tend to avoid interactions with persons with disabilities. Subjects were given the choice of viewing one of two similarly-themed films on a television monitor. Choosing one film required the subject to sit next to a person with a visible physical disability; if the subject chose the other film, he or she would sit next to a person with no apparent disability. The subjects routinely selected the film that did not require sitting next to the person with a disability.[43] These results vividly underscore how the psychological distress some people experience when interacting with persons with disabilities can limit the latters' ability to be integrated members of society.

4. Paternalization and Pity

A final basis of prejudice is one that at first appears benign. Many who view people with disabilities as neither incompetent, evil, subhuman, unnerving nor repugnant nonetheless harbor perceptions about them that result in

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[41] Harlan Hahn, *Paternalism and Public Policy*, Soc'y, Mar.-Apr. 1983, at 36, 44; Safilios-Rothschild, *supra*, at 10-11 ("The nondisabled feel repulsion and disgust for the disabled - in different degrees of intensity and about different types of disability - and then usually guilt because of these 'unacceptable' feelings.").

[42] *See, e.g.*, National Organization on Disability, Louis Harris & Assoc., Public Attitudes Toward People with Disabilities 17, 18, 31 (1991).

[43] Melvin L. Snyder et al., *Avoidance of the Handicapped: An Attributional Ambiguity Analysis*, 37 J. Personality & Soc. Psychol. 2297, 2303-04 (1979).

diminished opportunity or segregation. These are people who believe that the world is simply too much of a struggle for persons with disabilities, and, therefore, that they should be protected from its vicissitudes. Illustrations of this principle are the phenomena of "poster children" and telethons.

Although ostensibly less invidious than prejudice based upon hostile animus, paternalistic attitudes also fence persons with disabilities out of mainstream society.

> Paternalism enables the dominant elements of a society to express profound and sincere sympathy for the members of a minority group while, at the same time, keeping them in a position of social and economic subordination. It has allowed the nondisabled to act as the protectors, guides, leaders, role-models, and intermediaries for disabled individuals who, like children, are often assumed to be helpless, dependent, asexual, economically unproductive, physically limited, emotionally immature, and acceptable only when they are unobtrusive.[44]

The "flip side" of the pitiable poster child is the "supercrip," the heroic overachiever who manages to perform strenuous physical acts notwithstanding his or her disability.[45] The all-too-frequent perception by many individuals that persons with disabilities must fall into one of these two camps, superhero or wretch, implies "that a disabled person is presumed deserving of pity - instead of

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[44] Harlan Hahn, *Disability and Rehabilitation Policy: Is Paternalistic Neglect Really Benign?* 42 Pub. Admin. Rev. 385, 388 (1982).

[45] Shapiro, *supra*, at 16. Well-known examples include Terry Fox, a cancer survivor whose run across Canada despite having an artificial leg prompted a television movie, one-armed baseball pitcher Jim Abbott, *id.* at 17-19, and two-time Tour de France champion and cancer survivor Lance Armstrong.

respect - until he or she proves capable of overcoming a physical or mental limitation through extraordinary feats."[46] Burdening disabled people with such unrealistic expectations before according them the basic respect routinely granted unimpaired people is grossly unfair, for the simple reason that most persons with disabilities, like most persons without disabilities, "are trying simply to lead normal lives, not inspire anyone," [47] and deserve to be allowed to do so without feeling like failures.

B. The Pernicious Nature of Prejudice Against Persons With Disabilities

As the foregoing suggests, the roots of prejudice towards persons with disabilities are varied, pervasive, and deeply engrained. Such prejudices date at least as far back as Biblical associations of disability with sin and punishment, and span virtually all industrial cultures and nationalities.[48]

Notwithstanding this long and widespread history of mistreatment, however, the outrage that accompanies prejudice against racial, ethnic and religious minorities has rarely been exhibited with regard to prejudice against the disabled population. This lack of response has been explained as a by-product of the paternalistic/stereotyped notion that persons with disabilities, unlike other minorities, "deserve" to be treated unequally.

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[46] *Id.* at 16.

[47] *Id.*

[48] *See, e.g.*, Robert Straus, *Social Change and the Rehabilitation Concept, in Sociology and Rehabilitation* 1, 3 (Marvin B. Sussman ed., 1965) (noting "variety of harsh and hideous treatments" to which "persons disabled by problems for which little could be done or which appeared only remotely related to the broader social need" have been subjected throughout Western history); *cf. School Board of Nassau County v. Arline*, 480 U.S. 273, 284 n.12 (1987) (hereinafter "*Arline*") ("[t]he isolation of the chronically ill and of those perceived to be ill or contagious appears across cultures and centuries, as does the development of complex and often pernicious mythologies about the nature, cause, and transmission of illness").

> [T]he lay culture's notion of tolerance toward handicapped people takes for granted the reality of the "self-evident" inferiority of the handicapped person. Instead of challenging this vulgar prejudice, it makes its analytical point of departure the negative feelings that our naïve perceptions of handicapped people often provoke in us. Yes, we say, handicapped people are indeed as helpless and incompetent as we believe them to be.[49]

However, the assumption that unequal treatment of persons with disabilities is based upon legitimate differences is a pernicious one. "[A] belief in the social incapacity of the handicapped" often "disguises ignorance or bigotry behind what we 'see' to be an obvious biological fact."[50] This risk is particularly significant because of the ease with which prejudiced attitudes against persons with disabilities can lie concealed behind a rational facade.[51]

The difficulty of detecting irrational prejudice is exacerbated by the fact that most people do not wish to acknowledge having an aversion to persons with disabilities. Several studies have noted a marked ambivalence in the response of unimpaired persons towards those with disabilities. Whereas "public, verbalized attitudes" are often favorable, "deeper, unverbalized feelings" are often rejecting.[52] A Canadian study, for

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[49] Gliedman & Roth, *supra*, at 32.

[50] *Id.* at 23.

[51] *See, e.g.*, Gary E. Holmes & Ronald H. Karst, *The Institutionalization of Disability Myths: Impact on Vocational Rehabilitation Services*, J. Rehabilitation, Jan.-Mar. 1990, at 20, 23 ("When a counselor makes a decision about the client's case solely to enforce conformity, the casefile may reflect nothing extraordinary. Counselors may unknowingly justify their stereotype-thinking and prejudicial behaviors in case records by using professional-sounding jargon.").

[52] Irwin Katz et al., *Attitudinal Ambivalence and Behavior Toward People with Disabilities, in Attitudes Toward Persons with Disabilities* 47, 48 (Harold E. Yuker ed., 1988). Thus, individuals' verbal impressions about persons

example, found that, although two-thirds of employers expressed willingness in principle to hire persons with developmental disabilities, at the conclusion of the survey only 26% of them would agree to receive job inquiries from such persons.[53] Such findings suggest that many people who disclaim any disability prejudice may nonetheless react in a prejudiced and exclusionary manner in real-life interactions with persons with disabilities.

C. The Effects Of Prejudice

Real-life links between irrational prejudices and unequal treatment of persons with disabilities manifest themselves repeatedly in three of the principal areas targeted by the ADA in which the states are heavily involved: employment; health services; and education.

1. Employment

The experience of persons with disabilities in the work force provides compelling evidence of the negative impact of societal prejudices. In a recent Harris Poll, only 56% of persons with disabilities who were able to work were employed, in contrast to 81% of the rest of the population.[54]

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with disabilities are frequently positive at the same time that their nonverbal physiological responses (such as body language, gestures, and physical distance) are negative. Harold H. Kelley et al., *Some Implications of Social Psychological Theory for Research on the Handicapped, in Psychological Research and Rehabilitation* 172, 186-87 (Lloyd H. Lofquist ed., 1960) (unimpaired persons experience ambivalence in social encounters with persons with disabilities, resulting in formal, stilted behavior intended to conceal negative feelings that may cause embarrassment).

[53] David Gibson & Gerrit Groeneweg, *Employer Receptivity to the Developmentally Handicapped: When "Yes" Means "No,"* Canada's Mental Health, June 1986, at 12, 15.

[54] Louis Harris & Assoc., The 2000 N.O.D./Harris Survey of Americans with Disabilities, Executive Summary, ¶¶ 5 and 6 (visited Aug. 9, 2000) (http://www.nod.org/hs2000.html) (hereinafter "2000 Harris Poll"). Importantly, however, these numbers reflect substantial improvement since enactment of the ADA. In 1986, a similar Harris poll reported that

The report that proposed enactment of the ADA concluded that prominent reasons for high unemployment and underemployment among persons with disabilities included "societal attitudes which cause employers to discriminate against persons with disabilities."[55] That conclusion was fully supported by empirical evidence.

For more than fifty years, the reported experiences of those who have employed individuals with disabilities have been almost overwhelmingly positive. In 1948, the Bureau of Labor Statistics examined the employment records of 11,000 physically disabled and 18,000 matched non-disabled workers in manufacturing plants throughout the country.[56] This study found that, as a group, persons with disabilities were as efficient as those without disabilities and had identical safety records. Subsequent studies have been similarly positive.[57]

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only 46% of those persons with disabilities who were able to work were employed. *Id.*

[55] National Council on the Handicapped, Toward Independence, A Report to the President and to the Congress of the United States 22 (1986).

[56] U.S. Dep't of Labor, Bull. No. 923, The Performance of Physically Impaired Workers in Manufacturing Industries 3 (1948).

[57] *See, e.g.,* U.S. Dep't of Labor, Bull. No. 234, Workmen's Compensation and the Physically Handicapped Worker 5 (1961) (concluding, upon review of employer studies from 1932 through 1961, that a qualified and properly placed worker with a physical disability is "a good worker," "reliable," "productiv[e]", and "careful"); U.S. Civil Service Comm'n, A Chain of Cooperation: Severely Physically Handicapped Employees in the Federal Service 3 (1976) (study of appointments of severely handicapped workers to Federal agency jobs from 1964 to 1975 concluded that their "work record is excellent."); George Howard, *The Ex-Mental Patient as an Employee: An On-the-Job Evaluation*, 45 Am. J. Orthopsychiatry 479, 482-483 (1975) (employees with history of psychiatric disabilities reported to have same job performance as other employees); Gopal C. Pati, *Countdown on Hiring the Handicapped*, 57 Personnel J. 144, 146 (1978) (1976-77 study of 8,000 handicapped people employed by 16 major corporations showed that they had lower absentee rates, equivalent or superior job performance, no impact on insurance costs, lower turnover, and required minimal to no accommodations); Henry A. Tombari, *Lending a Hand to the Handicapped: A Primer for Business*, Advanced Mgmt.

Given this uniformly positive work history, various governmental and research organizations have concluded that prejudice is the major reason that otherwise qualified persons with disabilities are underemployed. In 1975, the Urban Institute observed that

> [v]irtually all the studies on employer attitudes have found that large proportions of employers disfavor hiring disabled people. There are strong indications that these attitudes are in large part based on nonrational, negative feelings – prejudice, in other words. . . . [58]

Fourteen years later, on the eve of the ADA's passage, state advocates and public officials agreed

> [upon] the significant and often negative impact of public and employer attitudes toward persons with disabilities. . . . . [¶][These] attitudes persist, despite evidence that handicapped workers are productive, countless experiences with persons with disabilities who have made successful adjustments to work settings, and studies

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J., Autumn 1979, at 44, 48-49 (study of 100 corporations found that disabled workers had lower than average productivity in only 10% of the cases, higher than average absenteeism in fewer than 5% of the cases, and lower turnover rates in 83% of the cases); Wendy S. Parent & Jane M. Everson, *Competencies of Disabled Workers in Industry: A Review of Business Literature*, J. Rehabilitation, Oct.-Dec. 1986, at 16, 16-19 (reviewing 13 articles reporting employers' positive experiences in hiring persons with disabilities); Louis Harris & Assocs., The ICD Survey II: Employing Disabled Americans (1987) (75% of managers polled give disabled employees a good or excellent rating on overall job performance).

Nor do the facts bear out the common complaint that the hiring of persons with disabilities is unduly costly to the employer. In the 1987 Harris Poll, 75% of managers who had employed persons with disabilities said that the average cost of hiring them was about the same as that of hiring non-disabled persons. *Id.*

[58] Urban Institute, Report of the Comprehensive Service Needs Study 324 (1975).

showing that most work place accommodations involve little cost. [59]

Indeed, at precisely the time Congress was reaching the conclusion that societal discrimination had adversely affected the employment of persons with disabilities, a commission examining this issue in the nation's most populous state made precisely the same finding:

> [T]he experience of people with disabilities who serve on the Commission, testimony, and research studies document discrimination as the major cause of unemployment among people with disabilities. [ ]. Many employers erroneously assume that providing a reasonable accommodation for a person with a disability would be complex and costly, when it may be as simple as providing a stool at a workbench, or placing a ramp over a stair. Surveys and testimony indicate that many employers are victims of myths about the competency and reliability of people with disabilities.[60]

In sum, the totality of the available data, going back at least 40 years, indicates that engrained and often hidden societal prejudices against persons with disabilities have a material adverse impact upon the ability of these persons to participate in the work force according to their true abilities.

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[59] Disability Rights Mandates, *supra*, at 73.

[60] California Dep't of Justice, Attorney General's Comm'n on Disability, Final Report 128 (1989) (hereinafter "California Report"). Again, the foregoing findings are not limited to physical disabilities. Christopher I. Stone & Birgit Sawatzki, *Hiring Bias and the Disabled Interviewee: Effects of Manipulating Work History and Disability Information of the Disabled Job Applicant*, 16 J. Vocational Behav. 96, 101 (1980) (job applicants presented as having had history of psychological disability – specifically, a nervous breakdown – found to be much less likely to be hired than applicants without such history, despite identical qualifications and interview performance).

2. Health Services

Prejudices against persons with disabilities manifest themselves in discriminatory behavior precisely in an area where people with disabilities may most need services – health care. Researchers have reported prejudice against people with disabilities in the health care community.[61] These negative attitudes in turn lead to adverse decisions about what, if any, health care services persons with disabilities will receive.

Most people with disabilities are satisfied with the quality of their lives.[62] Moreover, after a period of adjustment, life satisfaction of persons with disabilities is not significantly related to the degree of physical impairment.[63] Health professionals, however, continue to

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[61] *See* Carol J. Gill, *Health Professionals, Disability, and Assisted Suicide: An Examination of Relevant Empirical Evidence*, J. Psychol., Pub. Pol'y & L. (forthcoming 2000) (noting that "studies consistently demonstrate that disability attitudes of health professionals are as negative and sometimes more negative than public attitudes"); Gliedman & Roth, *supra*, at 17 ("despite their condemnations of prejudice toward the disabled, [the models of health care professionals] share far more with longstanding myths and stereotypes about handicap than has generally been recognized."); Lindsay Gething, *Judgments by Health Professionals of Personal Characteristics of People with a Visible Physical Disability*, 34 Soc. Sci. & Med. 809, 812-14 (1992) (health care professionals shown a videotaped employment interview of interviewee depicted in a wheelchair devalued interviewee in characteristics unrelated to the disability).

[62] M. G. Eisenberg & C.C. Saltz, *Quality of Life Among Spinal Cord Injured Persons: Long Term Rehabilitation Outcomes*, 29 Paraplegia 514, 517-18 (1991) (citing various studies).

[63] Gill, *supra* (citing studies); Nancy Weinberg, *Another Perspective: Attitudes of Persons with Disabilities, in Attitudes Toward Persons with Disabilities* 141, 142-43 (Harold E Yuker ed., 1988) (in study of 88 persons with various physical disabilities, including muscular dystrophy, cerebral palsy, and multiple sclerosis, most viewed it as merely a fact of life, or at most an inconvenience; fewer than 20% viewed it as a cause of frustration, a terrible thing, or the worst thing that ever happened to them); *id.* at 143-53 (subsequent study showing that a significant percentage of persons with physical disabilities would not choose to have corrective surgery even if success were assured and there were no risks attached).

make decisions based upon their assumption that persons with disabilities have a poor quality of life. Numerous studies find that health care professionals routinely undervalue the life satisfaction of persons with disabilities.[64] Professionals who believe that they personally would not wish to live with a particular disability are far less likely to support life-saving treatment for a patient with such a disability. Studies performed from 1977 through 1994 have shown that: emergency care professionals who devalue life with high-level spinal cord injuries are far more likely to withhold life-saving surgeries for such patients; healthcare providers often oppose life-sustaining treatment for persons with high-level quadriplegia; 41% of Muscular Dystrophy Association clinic directors would discourage ventilator use by patients facing respiratory failure; and two-thirds of pediatric surgeons would not support life-sustaining surgery for a child with Down's syndrome.[65]

Pessimistic views of the quality of life with a disability are even used to justify euthanasia. Thus, in 1975, a proponent of withholding life-saving health services from infants born with disabilities employed precisely the rhetoric discussed above - the stigmatizing notion of the "otherness" of persons with disabilities - to justify his argument: "[C]onception and birth by human parents does

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[64] *See* Gill, *supra* (citing studies of overly pessimistic attitudes of health professionals toward quality of life of spinal cord injury patients, persons with quadriplegia, ventilator-assisted polio survivors, elderly patients with chronic conditions, laryngectomy patients, persons with spina bifida, and children with developmental disabilities).

[65] *Id.*; *see also* Glenn G. Affleck, *Physicians' Attitudes Toward Discretionary Medical Treatment of Down's Syndrome Infants*, 18 Mental Retardation 79, 80 (1980) (noting, upon review of four surveys on physician attitudes, that "a majority of physicians sampled prefer that at least some infants with Down's Syndrome not be treated 'aggressively' to correct life-threatening conditions that in otherwise normal infants unquestionably would prompt intervention"); Mark L. Wolraich et al., *Pediatricans' Perceptions of Mentally Retarded Individuals*, 80 Pediatrics 643, 643 (1987) ("many physicians have an unduly pessimistic impression of the potential of handicapped infants").

not automatically endow one with personhood. . . . Some other characteristic or feature must be present in the organism for personhood to vest, and this the defective infant arguably lacks."[66] Similar prejudices deny the basic humanity of people with severe mental retardation.[67] As recently as 1985, a book on medical ethics stated matter-of-factly that "some infants with severe disabilities should be killed."[68]

The negative views of the health care community against persons with disabilities go beyond the theoretical, with deadly, real-world effects. In the late 1980's, doctors and a state court judge, citing poor quality of life, supported and agreed to 34-year old quadriplegic Larry James McAfee's request that he be allowed to die, even though McAfee could function quite capably with the use of a respirator. In fact, McAfee's main problem was not his disability, but depression from constantly being shunted back and forth from one inappropriate state health care facility to another. When finally placed in a proper environment, McAfee reported himself happy to be alive.[69]

Others have not been as fortunate. In the early 1970's and throughout the 1980's, thousands of disabled newborns were denied lifesaving medical treatment every

[66] John A. Robertson, *Involuntary Euthanasia of Defective Newborns: A Legal Analysis*, 27 Stan. L. Rev. 213, 246-47 (1975).

[67] Peter Paul Rickham, *The Ethics of Surgery in Newborn Infants*, 8 Clinical Pediatrics 251, 251 (1969) ("One might ask whether class five [profound mental retardation] can be regarded as being 'humanly alive' in the sense in which we usually understand these words"); Joseph Fletcher, *Indicators of Humanhood: A Tentative Profile of Man*, Hastings Center Rep., Nov. 1972, at 1, 1 ("Any individual of the species *homo sapiens* who falls below the I.Q. 40-mark in standard Stanford-Binet test . . . is questionably a person; below the 20-mark, not a person"); Bernard Bard & Joseph Fletcher, *The Right to Die*, The Atlantic, Apr. 1968, at 59, 64 (suggesting that a parent withholding medical care from a child with Down's syndrome should feel no guilt, because a "Down's is not a person").

[68] Helga Kuhse & Peter Singer, *preface* to *Should the Baby Live? The Problem of Handicapped Infants* (Peter Singer ed., 1985).

[69] Shapiro, *supra*, at 258-288.

year.[70] In 1983, the Oklahoma Health Sciences Center even adopted a selection process for deciding whether to treat infants with spina bifida that used a mathematical formula to measure quality of life.[71] Because untreated infants with spina bifida typically expire within a few months of birth, the decision to withhold treatment was effectively a death sentence.

In short, in health care as in employment, misconceptions about the value of life with a disability have led to invidious discriminatory behavior that severely limits the opportunities - including, on occasion, the opportunity to live at all - of persons with disabilities.

3. Education

Irrational prejudice also has an adverse impact upon the education of children with disabilities. A key aspect of the education of students with disabilities is the willingness of states to provide an education that will equip them to participate in all aspects of society. Unfortunately, educators systemically tend to underestimate the potential of students with disabilities. The consequence has been the closure of the most important avenue for liberating people with disabilities.

Researchers have found that "practicing teachers demonstrate[] significantly more negative attitudes toward various groups of exceptional children (e.g., physically handicapped children, mentally retarded children, learning

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[70] Accommodating the Spectrum, *supra*, at 35, and newspaper and periodical articles cited therein; John A. Robertson, *Legal Aspects of Withholding Medical Treatment from Handicapped Children, in Legal And Ethical Aspects of Treating Critically and Terminally Ill Patients* 213 (A. Edward Doudera & J. Douglas Peters eds., 1982) ("[w]ithholding necessary medical care from defective newborns in order to cause their death is a common practice in many medical centers across the United States").

[71] Richard H. Gross et al., *Early Management and Decision Making for the Treatment of Myelomeningocele*, 72 Pediatrics 450, 456 (1983) (*citing* A. Shaw, *Defining the Quality of Life*, Hastings Center Rep., 1977).

disabled children, and emotionally disturbed children) than toward normal children."[72] In the eyes of educators, "[t]he label of disability often is associated with lower expectation or perception that the students' performance will be diminished."[73]

Given such attitudes, it is hardly surprising that people with disabilities report being consistently steered into academic programs that neither conform to their demonstrated abilities nor prepare them for employment.[74] Nor is it surprising that their educational attainment lags behind that of the rest of the population. Persons with disabilities are much less likely to complete high school or college than persons without disabilities.[75]

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[72] Thomas S. Parish et al., *Normal and Exceptional Children's Attitudes Toward Themselves and One Another*, 104 J. Psychol. 249, 249 (1980).

[73] Sharon Field et al., *Effects of Disability Labels on Teachers' Perceptions of Students' Self-Determination*, 75 Perceptual & Motor Skills 931, 931 (1992), *citing* R. Taylor et al., *The Effects of Labels and Assigned Attributes on Teacher Perceptions of Academic and Social Behavior*, 18 Educ. & Training Mentally Retarded 45 (1983); *see also* Herbert Grossman, *Special Education in a Diverse Society: Improving Services for Minority and Working-Class Students*, Preventing School Failure, Fall 1991, at 19, 21 ("Educators judge the work and performance of [disabled] students to be lower or less adequate than it actually is and their intellectual potential and social skills to be lower than objective data would suggest.").

[74] *See, e.g.*, Marilynn J. Phillips, *Damaged Goods: Oral Narratives of the Experience of Disability in American Culture*, 30 Soc. Sci. & Med. 849, 854-55 (1990); *see also* Kim C. Oppenheimer & Max D. Miller, *Stereotypic Views of Medical Educators Towards Students with a History of Psychological Counseling*, 35 J. Counseling Psychol. 311, 312 (1988) (medical school residency program applicants with history of psychological counseling less likely to be invited for interview or accepted into program).

[75] *See* 2000 Harris Poll at ¶ 10 (percentage of persons with disabilities who fail to complete high school is more than twice that of rest of population; 12% of persons with disabilities receive college degrees, compared to 23% of the rest of the population); *see also* Thomas M. Shea & Anne M. Bauer, *Learners with Disabilities: A Social Systems Perspective of Special Education* 20 (Sue Pulvermacher-Alt et al. eds., 1994) (persons with disabilities have far less education than other Americans). Again, however, there has been a marked improvement in the years since enactment of the ADA. In 1986,

Two stories perhaps best illuminate the negative impact of disability prejudice in public education. In the hearings leading up to the enactment of the Rehabilitation Act, Representative Vanik cited a case where a court found that an academically competitive child with cerebral palsy should be excluded from public school because his teacher claimed his physical appearance "produced a nauseating effect" on his classmates.[76]

A second commentator recounts the story of a post-polio quadriplegic enrolling at the prestigious University of California at Berkeley - a renowned state university. The California Department of Rehabilitation refused to pay for the same four-year education for a quadriplegic student that it did for less severely disabled students, because the expenditure of such sums "would be wasted since it was 'infeasible' that he could ever work." Then, when the student lobbied Berkeley directly, he was informed very matter-of-factly by one dean that they had "tried cripples before and it didn't work."[77]

Incidents like these vividly demonstrate that prejudice has negatively affected the educational opportunities of persons with disabilities, just as it has negatively affected their employment and health care opportunities.

IV.
CONCLUSION

The ADA is predicated on the fundamental notion that persons with disabilities are entitled to be meaningful participants in society, restricted only by the true (as opposed to presumed) limitations imposed by their specific disabilities. This was a step that previous legislation had not taken. As late as 1989, for example, California's

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only 61% of persons with disabilities had graduated from high school, compared to nearly 80% today. 2000 Harris Poll, *supra*, at ¶ 12.

[76] 117 Cong. Rec., 45974 (1971) (*cited in Arline*, 480 U.S. at 282 n.9).

[77] Shapiro, *supra*, at 44-45.

Commission on Disability had acknowledged that California's own

> agencies continue to use unfair social policies premised on paternalism and discriminatory attitudes which effectively exclude people with disabilities from full participation in community life. ... In their fear of disability, their devaluation of the lives of people with disabilities, and in their unwillingness to share resources equitably, they have shunned their responsibility to guarantee equal opportunity for all.[78]

In 1987, this Court recognized the truth of Congress's determination that "society's accumulated myths and fears about disability are as handicapping as are the physical limitations that flow from actual impairment."[79] That observation is no less apt today. Society's deep-seated and hidden "myths and fears" about disability continue to have significant real-world consequences for the lives of people with disabilities. By admitting persons with disabilities into the mainstream of American society, the ADA represents major progress toward reversing

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[78] California Report, *supra*, at 57; *see also* Richard H. Scotch, From Good Will to Civil Rights: Transforming Federal Disability Policy, 9-10 (1984) ("Most [federal] programs [prior to the ADA] perpetuated an image of disabled people as socially incomplete or damaged as a result of their physical or mental impairments. Seen as incapable of self-sufficiency, they were to be pitied, and stigmatized; both help and segregation were deemed appropriate. [ ] Such views were deeply entrenched in American society.").

[79] *Arline*, *supra*, 480 U.S. at 284; *see also Report of a United Nations Expert Group Meeting on Barrier Free Design*, 26 Int'l Rehabilitation Rev. 3 (1975) ("[m]ore people are forced into limited lives and made to suffer by ... man-made obstacles than by any specific physical or mental disability"); Disability Rights Mandates, *supra*, at 20 ("Probably the most significant barriers faced by persons with disabilities relate to the attitudes, predispositions, and behaviors of nondisabled persons. Such attitudes range from negative views of disability to discomfort in associating with people who experience some form of disability.").

prejudiced attitudes and improving the environment in which persons with disabilities live.[80]

August 11, 2000

Respectfully submitted,

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[80] Allowing persons with disabilities to be full participants in American society is necessary to end the Catch-22 of disability discrimination. *See* n. 19, *supra*. Numerous studies indicate that mainstream contact, in a context of equality rather than subordination, helps "disconfirm stereotypes" about persons with disabilities. Harold E. Yuker, *Variables that Influence Attitudes Toward People with Disabilities: Conclusions from the Data, in Psychosocial Perspectives on Disability*, 3, 6-7 (Dana S. Dunn ed., 1994); *see, e.g.*, Frank Bowe, *Handicapping America: Barriers to Disabled People* 112 (1978) ("People who have had extensive contact with disabled people tend to regard them more favorably . . . than do people with less contact . . . ."). Indeed, if interaction occurs early in life, it can even prevent prejudicial attitudes from forming in the first place. California Report, *supra*, at 89 (day-to-day contact in "[i]ntegrated school settings may enable non-disabled children to have normal contact with their peers with disabilities and prevent their becoming victims of myths and stereotypes about people with disabilities").

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Supreme Court of the United States

THE UNIVERSITY OF ALABAMA AT BIRMINGHAM, BOARD OF TRUSTEEES, et al.,

Petitioners,

v.

PATRICIA GARRETT and MILTON ASH,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF THE STATES OF MINNESOTA, ARIZONA, CONNECTICUT, ILLINOIS, IOWA, KENTUCKY, MARYLAND, MASSACHUSETTS, MISSOURI, NEW MEXICO, NEW YORK, NORTH DAKOTA, VERMONT, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE* STATES

This *amici curiae* brief is submitted on behalf of fourteen (14) states: Minnesota, Arizona, Connecticut, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Missouri, New Mexico, New York, North Dakota, Vermont, and Washington. The *amici curiae* States strongly support affirmance of the Eleventh Circuit Court of Appeals' decision and the resulting use of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1994 and Supp. III 1997) ("ADA"), by their citizens without limitation. Although the States more typically advocate the application of Eleventh Amendment immunity, this case is different. The extremely important public policy underlying the landmark ADA legislation and the Eleventh Amendment jurisprudence as applied to the ADA, cause the *amici curiae* States, consistent with the obligation of their respective attorneys general to protect the public interest, to file this *amici curiae* brief.

Where, as here, a legislative enactment constitutes a valid exercise of Congress's Section 5 powers under the Fourteenth Amendment, the States have a compelling interest in the full implementation of the law. As such, to eradicate the effects of the extensively documented, long-term, pervasive and invidious discrimination against people with disabilities, it is critical that the States be leaders in facilitating this duly enacted Section 5 legislation. Allowing state employees and other citizens to enforce their ADA rights without restriction furthers the ADA's important equal protection-based purpose and the *amici curiae* States' desire to eliminate discrimination against the members of our society with disabilities. Under these

circumstances, the *amici curiae* States believe it is imperative to support the validity of the ADA in its entirety.[1]

SUMMARY OF ARGUMENT

This Court should affirm the Eleventh Circuit's decision and hold that the ADA's express abrogation of the States' Eleventh Amendment immunity was proper. The Eleventh Circuit's decision correctly applies well-settled principles of constitutional law.

The Court has often recognized that people with disabilities suffer culturally-based discrimination resulting from irrational fears, prejudices and ignorance. *See, e.g., Alexander v. Choate,* 469 U.S. 287 (1985); *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432 (1985); *School Bd. of Nassau County v. Arline,* 480 U.S. 273 (1987). Consistent with this judicial precedent, Congress had overwhelming evidence of widespread and invidious discrimination against individuals with disabilities, including such discrimination by the States, to properly invoke its Section 5 powers. Both the record before Congress and common sense shows that this pervasive, societal discrimination against people with disabilities undoubtedly

[1] An individual state undoubtedly could waive its Eleventh Amendment immunity. *See Idaho v. Coeur d'Alene Tribe,* 521 U.S. 261, 267 (1997). The applicability of the ADA, however, should not depend on the fortuity of the state of residency of a particular person with a disability. Such a result would severely undermine the important purpose of this national legislation and the proper application of Congress's Section 5 authority. *See supra* pp. 1-2.

impacted state decisions. Indeed, State officials were not immune from the negative attitudes and unfair stereotypes about people with disabilities that pervaded our society, and thus States unfortunately engaged in numerous activities that unconstitutionally discriminated against individuals with disabilities. Congress's unequivocal and unqualified findings of rampant discrimination against people with disabilities, including activities engaged in by the States, are soundly based.

Congress also provided for a congruent and proportional remedy for the widespread constitutional violations it found. In accordance with the decision in *City of Cleburne*, 473 U.S. at 442-443, where this Court recognized that the legislative branch is in a better position than the judiciary to address disability discrimination, Congress tailored appropriate and balanced legislation to remedy and deter continued discrimination against people with disabilities. The legislative response was commensurate with the Congressional record and findings establishing pervasive, culturally-based disability discrimination. As authorized by Section 5 of the Fourteenth Amendment, the ADA not only proscribes future discrimination prohibited by the Equal Protection Clause, but also seeks to deter such discrimination.

The important limitations to the ADA's remedial scheme provide further evidence of Congress's proportionate and congruent response to the endemic, nationwide problem of discrimination based on disability. By imposing significant restrictions on the law's applicability, the ADA appropriately balances the needs of the States with meaningful protection against disability discrimination. Accordingly, Congress's enactment of the

ADA's comprehensive remedial scheme, including its abrogation of the States' Eleventh Amendment immunity, was a proper exercise of its power to enforce the Equal Protection Clause of the Fourteenth Amendment and protect people with disabilities from discrimination.

ARGUMENT

IN ENACTING THE ADA, CONGRESS PROPERLY ABROGATED THE STATES' ELEVENTH AMENDMENT IMMUNITY.

Congress may abrogate the States' Eleventh Amendment immunity from suit in federal court if two requirements are met. First, Congress must make its intention to abrogate "unmistakably clear in the language of the statute." *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 640 (2000) (citations omitted). Second, Congress must act pursuant to its Section 5 enforcement powers of the Fourteenth Amendment. *See id.*, 120 S. Ct. at 644; *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59 (1996).

It is undisputed that Congress clearly stated its intention to abrogate the States' Eleventh Amendment immunity.[2] Thus, the issue before the Court is whether the ADA constitutes a proper exercise of Congress's Section 5 powers. Supreme Court precedent establishes that the ADA was a valid Section 5 legislative enactment.

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[2] *See* 42 U.S.C. § 12202 (1994) ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter.").

A. Congress Properly Invoked Its Section 5 Powers Under The Fourteenth Amendment.

The Court recently re-affirmed that Section 5 of the Fourteenth Amendment is a broad affirmative grant of power to Congress "both to remedy and to deter violations of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel*, 120 S. Ct. at 644. Moreover, the Court acknowledged that "[i]t is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." *Id.* at 644 *(quoting City of Boerne v. Flores*, 521 U.S. 507, 536 (1997)).

To be valid, Congressional enactments pursuant to Section 5 must have a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* In this regard, "difficult and intractable problems often require powerful remedies," and Section 5 does not preclude Congress from enacting reasonable prophylactic legislation, *id.* at 648, even when the legislation prohibits substantially more state "decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard." *Id.* at 647. Because Congress had overwhelming evidence that people with disabilities had been subjected to long-standing, pervasive and invidious discrimination that denied them the opportunity to participate fully in nearly every aspect of

modern life, including government employment and public services, the ADA's remedial and preventative provisions are both a congruent and proportional response to this nationwide problem.

1. The ADA is supported by compelling evidence of a widespread pattern of culturally-based discrimination against people with disabilities, including discrimination by the States.

This Court has acknowledged that "[t]o be sure, well-cataloged instances of invidious discrimination against the handicapped do exist." *Alexander v. Choate*, 469 U.S. 287, 295 n.12 (1985). In *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), members of the Court recognized that people with disabilities had suffered "a history of unfair and often grotesque mistreatment" due to pervasive ignorance and prejudice, *id.* at 454 (Stevens, J., concurring), and that decisions concerning people with disabilities were often the result of "impermissible assumptions" and "irrational fears or ignorance," *id.* at 465, 467 (Marshall, J., concurring and dissenting). The Court in *City of Cleburne* unanimously determined that the city's action at issue had rested upon irrational prejudices against people with mental retardation and was, therefore, violative of the Fourteenth Amendment. *See id.* at 450. The Court subsequently referred to "irrational fears" regarding people with disabilities and noted that "Congress acknowledged that society's accumulated myths and fears about disability . . . are as handicapping as the physical limitations that flow from actual impairment." *School Bd. of Nassau County v. Arline*, 480 U.S. 273,

284 (1987). In *Olmstead v. L.C. ex rel. Zimring*, 119 S. Ct. 2176, 2187 (1999), the Court again referenced the "unwarranted assumptions" that impact decisions made with respect to people with disabilities.

It is not surprising that, consistent with the Court's own analysis, Congress found systematic and widespread culturally-based discrimination against people with disabilities. Congress's thorough review resulted in the unequivocal conclusions that "historically, society has tended to isolate and segregate individuals with disabilities," and individuals with disabilities had been "subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society." 42 U.S.C. §§ 12101(a)(2), (a)(7) (1994). Further, as determined by Congress, this discrimination affected every significant life activity, including "employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. § 12101(a)(3) (1994).[3]

The Congressional record is replete with evidence of pervasive societal discrimination against individuals with disabilities. *See, e.g., Coolbaugh v. Louisiana*, 136 F.3d 430, 437-38 & n.4 (5th Cir.), *cert. denied*, 525 U.S. 819 (1998) (chronicling the massive and compelling Congressional record that preceded passage of the ADA). An example of

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[3] Other Congressional findings included that people with disabilities "continually encounter various forms of discrimination, including outright intentional exclusion, . . . segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities." 42 U.S.C. § 12101(a)(5) (1994).

this powerful evidence is the testimony of Justin Dart, the Chairperson of the Task Force on the Rights and Empowerment of Americans with Disabilities. After chairing 63 public forums involving every state in the country, Mr. Dart testified that:

> Although America has recorded great progress in the area of disability during the past few decades, *our society is still infected by the ancient, now almost subconscious assumption that people with disabilities are less than fully human* and therefore are not fully eligible for the opportunities, services, and support systems which are available to other people as a matter of right. *The result is massive, society-wide discrimination.*

S. Rep. No. 101-116, at 8-9 (1989); H. Rep. 101-485, pt. 2, at 31-32 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 313 (citing Testimony before House Subcommittees on Select Education and Employment Opportunities, Ser. No. 101-37, July 18, 1989, p. 62) (emphasis added).

Likewise, Arlene Mayerson, the directing attorney of the Disability Rights Education and Defense Fund, detailed the many studies that established the "misconceptions and generalizations about disabilities, unfounded fears about increased cost and decreased productivity and outright prejudice towards disabled people." *Americans With Disabilities Act of 1989: Hearings on H.R. 2273 Before the Subcomms. on Employment Opportunities and Select Educ. of House Comm. on Educ. and Labor,* 101st Cong. 69 (1989). She further testified that "[n]umerous studies have been conducted that conclude that disabled people are subject to the same type of prejudices and discrimination as members of racial and

ethnic minorities." *Id.* at 84. This comprehensive record of pervasive societal discrimination against people with disabilities is not disputed. *See, e.g.*, Brief of Petitioners at 34 (acknowledging "history of societal discrimination against the disabled").

Congress also had substantial and credible evidence from which it reasonably concluded that the States had been part of the widespread pattern of societal discrimination against people with disabilities. This fact distinguishes the ADA from the nearly non-existent record of unconstitutional state action that undermined the validity of both the Religious Freedom Restoration Act[4] and Congress's abrogation of the States' Eleventh Amendment immunity under the Age Discrimination in Employment Act.[5]

a. The conclusion that the States unconstitutionally discriminated against people with disabilities has substantial factual support.

The ADA legislative record documents State actions that were based on irrational stereotypes against people with disabilities and, therefore, unconstitutional under *City of Cleburne*. *See* 473 U.S. at 450. For example, the record before Congress included the United States Commission on Civil Rights report, *Accommodating the Spectrum of Individual Abilities* (1983), which details the history of State institutionalization and other policies that were

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[4] *See City of Boerne v. Flores*, 521 U.S. 507, 531 (1997).

[5] *See Kimel*, 120 S. Ct. at 649.

applied in a discriminatory manner against people with disabilities. *Id.* at 32-37. These State practices often were unconstitutionally based on "irrational fears or ignorance, traceable to the prolonged social and cultural isolation" of people with disabilities. *City of Cleburne*, 473 U.S. at 467 (Marshall, J., concurring and dissenting). As Justice Marshall declared: "A regime of state-mandated segregation . . . emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow." *Id.* at 462. Even recently, the Court stated that "institutional placement of persons who can handle and benefit from community settings perpetrates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life." *Olmstead*, 119 S. Ct. at 2187.

Similarly instructive is the report of the Advisory Commission on Intergovernmental Relations (ACIR), *Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal* (Apr. 1989), that was issued approximately one year prior to the enactment of the ADA.[6] The document contains the

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[6] Six members of Congress participated in this bipartisan commission that studied relations among governmental entities. *See* 42 U.S.C. §§ 4271-4273 (1988). Two of the Congressional participants, one from the Senate and one from the House of Representatives, were also members of Congressional committees that considered the ADA legislation. *See Americans With Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong. ii (1989) (committee and subcommittee membership); *Americans With Disabilities Act of 1989: Hearings on H.R. 2273 Before the House Comm. on the Judiciary and the Subcomm. on Civil and Constitutional Rights of the*

results of a comprehensive survey of state officials on impediments to employment of people with disabilities in state governments *Id.* at 70-74. The report shows that thirty-five percent (35%) of state officials considered negative attitudes and misconceptions to be strong impediments to employment of people with disabilities, and that forty-eight percent (48%) considered those reasons to be moderate impediments. *Id.* at 72. In other words, the survey reveals that a total of **eighty-three percent (83%)** of state officials acknowledged that negative attitudes and misconceptions about individuals with disabilities influenced employment decisions of state governments.[7] *Id.* at 72-73.

The ACIR report concluded that even when States had appropriate written disability employment policies, they were often ignored due to "negative attitudes and misconceptions about persons with disabilities and their performance capabilities." *Id.* at 75. The report noted that the reasons underlying state officials' negative attitudes and misconceptions about people with disabilities

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House Comm. on the Judiciary, 101st Cong. ii (1989) (committee and subcommittee membership). The Commission's draft report was referenced on May 9, 1989 in testimony before Congress regarding the ADA. *See Americans With Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped,* 101st Cong. 306-307 (1989) (statement of Arlene Mayerson).

[7] *See also Americans With Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped,* 101st Cong. 312-313 (statement of Arlene Mayerson) (describing evidence that most government agencies in California refused to hire people with cancer).

included "feelings of discomfort in associating with disabled individuals, inaccurate assessments of their productivity, and concerns about the costs that might be associated with work place accommodations." *Id.* at 73.

The record before Congress also demonstrated that the cultural biases and arbitrary stereotypes regarding individuals with disabilities resulted in the systematic unconstitutional denial of basic educational opportunities. Although Congress had previously enacted legislation to promote educational opportunities for people with disabilities,[8] the 1983 Civil Rights Commission report determined that children with disabilities still were being deprived an appropriate education. *See* U.S. Comm'n on Civil Rights, *supra*, at 28. Based on societal prejudices, many children with disabilities were simply segregated in separate public educational facilities. *See id.* at 29. Other children with disabilities were excluded altogether from public schools. *Id.* at 27. Congress heard numerous examples of children with disabilities who were precluded from attending public schools for a variety of reasons, including that the children used wheelchairs, had epilepsy, and had cerebral palsy that allegedly produced a "nauseating effect" on fellow students and teachers.[9] These widespread practices necessarily had a

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[8] *See* 20 U.S.C. §§ 1400-1491 (1994 and Supp. IV 1998) (originally enacted as the Education of the Handicapped Act, Pub. L. 91-230, Title VI, 84 Stat. 121, 175-188 (1970) and subsequently amended).

[9] *See, e.g.*, S. Rep. No. 101-116, at 7 (1989) (quoting testimony of Judith Heumann, World Institute on Disability); *Americans with Disabilities Act of 1988: Hearing on H.R. 4498 Before the Subcomm. on Select Educ. of House Comm. on Educ. and Labor*, 100th Cong. 132-133 (1988) (testimony of Barbara Waters).

tremendous adverse impact on the victims of the discrimination. *See Plyler v. Doe*, 457 U.S. 202, 221 (1982) (noting the importance of education in maintaining our civic institutions and "the lasting impact of its deprivation on the life of the child").[10]

In addition, Congress was aware that people with disabilities were denied access to public facilities because their needs were rarely taken into account when public buildings and sidewalks were designed and built. Little or no consideration was given, for example, to the ability of people in wheelchairs or with visual impairments to use those public facilities. *See* U.S. Comm'n on Civil Rights, *supra*, at 21-22, 38-39; *see also Americans With Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong., 662-664 (1989) (testimony of Mary Lynn Fletcher). This lack of access adversely impacted the ability of people with disabilities to effectively participate in the state governmental process,

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[10] As this Court reasoned in *Plyler*: "The inestimable toll of that deprivation [education] on the social economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause." 457 U.S. at 222.

including the ability to exercise their right to vote[11] and to utilize the state judicial system.[12]

Illinois Attorney General Neil Hartigan also provided persuasive testimony based on the six years he had served as a state Attorney General. He testified regarding the persistent and widespread discrimination against people with disabilities involving, for example, public transportation, public services, public parks, publicly owned facilities, special education and elections. *See Americans With Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped,* 101st Cong. 75-78 (1989). Attorney General Hartigan urged passage of a uniform national standard to free people with disabilities from having to win their rights on a state-by-state basis.[13] *See*

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[11] *See, e.g., Hearing on H.R. 2273, Americans with Disabilities Act of 1989: Hearing on H.R. 2273 Before Subcomm. on Select Educ. of the House Comm. on Educ. and Labor,* 101st Cong. 41, 45 (1989) (testimony of Nanette Bowling, staff liaison to mayor of Kokomo, Indiana) (describing "devastating disincentives to voting" faced by people with disabilities).

[12] *See, e.g., Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988: Hearing on H.R. 4498 Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor,* 100th Cong. 40-41 (1988) (statement of Emeka Nwojke) (describing barriers faced by persons with disabilities that impeded their access to court).

[13] The legislative record shows that although some states had enacted disability laws, the state statutes varied greatly and many provided little meaningful protection against disability discrimination. *See, e.g., Americans With Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped,* 101st Cong. 334-337 (1989) (statement of Arlene Mayerson) (describing

id. at 77. He further explained that any meaningful legislation to combat disability discrimination must include a remedial provision. *See id.* at 80-81.

It is also significant that there was no opposition from the States to Congress's abrogation of their Eleventh Amendment immunity with respect to the ADA. In fact, the ADA was affirmatively endorsed by the National Association of Attorneys General and the National Association of Counties. *See* 135 Cong. Rec. 19,799 (1989).

Based on the foregoing, Congress clearly had compelling evidence of discrimination against people with disabilities, including unconstitutional discrimination by the States. Accordingly, the findings of Congress that underlie the enactment of the ADA, including those specifically relating to State actions, are soundly based.[14]

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limitations and ineffectiveness of existing State statutes); *Field Hearing on Americans with Disabilities Act: Hearing Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor,* 101st Cong. 89 (1989) (statement of Hon. Chet Brooks, Texas State Senate) ("Just as with other major civil rights issues addressed by our nation in the past, basic rights for people with disabilities have to be addressed at a national level. We cannot effectively piece these protections together state by state, person by person."). *See also* H. Rep. 101-485, pt. 2, at 47 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 329 ("State laws are inadequate to address the pervasive problems of discrimination that people with disabilities are facing. . . . 'Too many States, for whatever reason, still perpetuate confusion.' ") (quoting testimony of Admiral James Watkins before the House Subcommittee on Select Education and the Senate Subcommittee on the Handicapped).

[14] *See* 42 U.S.C. § 12101(a)(3) (noting persistent discrimination in activities involving States, such as employment, housing,

b. Common sense shows that the States were participants in the pervasive culturally-based discrimination against people with disabilities.

Finally, beyond the legislative record,[15] it defies common sense to suggest that the perpetrators of pervasive discrimination against people with disabilities did not include agents of the States. As this Court has determined, discrimination against individuals with disabilities, which was widespread and based on irrational "myths" and "stereotypes," impacted our society's very culture. *See City of Cleburne*, 473 U.S. at 446; *Arline*, 480 U.S. at 279-85; and *Alexander*, 469 U.S. at 295 n.12. Under these circumstances, one cannot credibly argue that only

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public accommodations, education, transportation, institutionalization, health services, voting, and access to public services). This and the other Congressional ADA findings are entitled to great deference by this Court. "Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the Legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker." *Radice v. People of the State of New York*, 264 U.S. 292, 294 (1924). Moreover, "[g]iven the deference due 'the duly enacted and carefully considered decision of a coequal and representative branch of our Government,' " a court does "not lightly second-guess such legislative judgments." *Board of Educ. of Westside Com. Sch. v. Mergens*, 496 U.S. 226, 251 (1990).

[15] *See Kimel*, 120 S. Ct. at 648 (indicating that review of the legislative record is but "one means" this Court has employed to determine the validity of Congressional enactments pursuant to Section 5 of the Fourteenth Amendment).

non-state entities discriminated against people with disabilities, but state officials, when making employment and other decisions on behalf of states, miraculously were not subject to the same cultural biases and irrational fears about individuals with disabilities.

Although in *Kimel* the Court refused to "extrapolate" conclusions with respect to the public sector, *see* 120 S. Ct. at 649, such an "extrapolation" is appropriate here. In *Kimel,* there was no record of pervasive societal age discrimination from which to extrapolate conduct to the States. *See id.* In this case, unlike *Kimel,* there is overwhelming evidence of invidious disability discrimination that was engrained in this country's culture. *See supra* pp. 10-15. *See also, e.g.,* S. Rep. No. 101-116, at 5-16 (1989); H.R. Rep. 101-485, pt. 2, at 28-43 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 310-325. As the House Report on the ADA concluded, people with disabilities "have been subjected to unequal and discriminatory treatment in a range of areas, based on characteristics that are beyond the control of individuals and resulting from stereotypical assumptions, fears and myths not truly indicative of the ability of such individuals to participate in and contribute to society." H.R. Rep. 101-485, pt. 2, at 40 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 322. The Senate Report made a similar determination. *See* S. Rep. 101-116, at 15 (1989). Of course, the conclusions reached by both the House and Senate are consistent with the Court's own statements on the subject. *See supra* pp. 6-7.

Due to this pervasive discrimination it is reasonable to conclude that the States were also participants in widespread discriminatory conduct against people with disabilities. This conclusion reflects human nature and

reality where a society-wide discriminatory bias has been established against individuals with disabilities. *See supra* pp. 11-12 (report of the Advisory Commission on Intergovernmental Relations documenting that 83% of state officials acknowledge that negative biases and stereotypes are impediments to States' hiring of people with disabilities). Indeed, Congress's findings of widespread discrimination were unqualified, including various activities engaged in by the States. *See supra* note 14. It properly determined that this pervasive disability discrimination infected state governments like all other parts of our society.

2. Given the substantial evidence of widespread culturally-based discrimination against people with disabilities, the ADA is a very measured and balanced response to remediate and deter disability discrimination.

The ADA's comprehensive response to the intractable and difficult problems facing people with disabilities is both congruent and proportional to the evils found by Congress. Section 5 of the Fourteenth Amendment authorizes Congress to take this remedial and preventative action to counter pervasive societal discrimination.

a. The ADA proscribes conduct that violates the Equal Protection Clause.

The ADA proscribes irrational discrimination on the basis of disability.[16] In so doing, the ADA seeks to ensure

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[16] ADA Title I prohibits employment discrimination against "an individual with a disability who, with or without

that decisions regarding employment or access to facilities, programs and services are rationally based and unaffected by arbitrary stereotypes or fears. *Cf. Arline*, 480 U.S. at 284-285 (noting that Rehabilitation Act aims to eliminate decisions affecting individuals with disabilities that are based on "prejudiced attitudes," "ignorance," "accumulated myths and fears" and to replace such reflexive actions with reasoned and sound judgments). This proscription falls squarely within the scope of the equal protection guarantees of the Fourteenth Amendment. *See City of Cleburne*, 473 U.S. at 446-48 (holding that arbitrary treatment of people with disabilities violates the Fourteenth Amendment).

b. The provisions of the ADA deter and prevent unconstitutional discrimination against people with disabilities.

Given the pervasiveness of past prejudices and inequitable actions directed toward individuals with disabilities, Congress determined in its legislative judgment that it was not enough to merely prohibit future unconstitutional discriminatory conduct. Rather, to deter and prevent pervasive culturally-based discrimination against

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reasonable accommodation, can perform the essential functions of the employment position." 42 U.S.C. §§ 12111(8), 12112(a) (1994). ADA Title II prohibits public entities from discriminating against "an individual with a disability who, with or without reasonable modifications . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. §§ 12131(2), 12132 (1994).

people with disabilities, and further implement its Section 5 powers, Congress required a "reasonable accommodation"[17] or "modification"[18] under Title I and II of the ADA, respectively, for qualified individuals with disabilities. A national problem of the magnitude documented by Congress and recognized by this Court, *see, e.g., City of Cleburne*, 473 U.S. at 454, 464-465, demands a solution that affirmatively prevents widespread societal disability discrimination and thus integrates individuals with disabilities into our society.

In this regard, the ADA exemplifies the kind of remedial legislation contemplated by this Court that "can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.' " *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (*quoting Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)). In light of the extensive Congressional record and judicial acknowledgment of widespread and persistent culturally-based discrimination against people with disabilities, Congress was able to exercise its Section 5 powers with some latitude and respond to this very serious public concern. *See South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (stating that "[t]he constitutional propriety of [section 5 legislation] must be judged with reference to the historical experience . . . it reflects").

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[17] 42 U.S.C. § 12112(b)(5)(A)-(B) (1994).

[18] 42 U.S.C. § 12131 (1994).

As part of this legislative discretion, Congress chose to proactively require certain reasonable accommodations to better ensure that people with disabilities will be afforded equal protection of the law. Requiring such an accommodation prevents, for example, an employer from relying on societal biases and stereotypes to arbitrarily deny an individual with a disability an employment opportunity.[19] Under the ADA framework the employer must affirmatively consider reasonable ways in which the disability can be accommodated so that irrational assumptions about people with disabilities do not control the decisionmaking process. Even the dialogue between an employer and employee regarding a particular accommodation will foster the kind of rational discussion and understanding of disabilities that society has avoided in the past, and thereby deter continued discrimination.[20] This reasoned legislative approach to uproot a history of culturally-based disability discrimination enhances the prospect that people with disabilities will enjoy the protections afforded them under the Fourteenth Amendment.

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[19] Similarly, requiring an employer to eliminate unnecessary employment standards or practices that have a discriminatory effect on persons with disabilities, *see* 42 U.S.C. § 12112(b)(3)(A) (1994), further deters reflexive discrimination based on decades of engrained irrational fears and prejudices.

[20] *See, e.g.*, 29 C.F.R. § 1630, app. § 1630.9 (1999) (Equal Employment Opportunity Commission interpretive guideline regarding ADA states that "[t]he appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and [employee] with a disability").

The ADA, therefore, is similar to the ban on voting literacy tests imposed by the Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437, which *Katzenbach v. Morgan*, 384 U.S. 641 (1966), upheld as a proper Section 5 enactment even though such literacy tests themselves do not violate the Fourteenth Amendment.[21] In *Morgan*, the Voting Rights Act was used to invalidate a state literacy test requirement which directly impacted New York City's Puerto Rican community. *See* 384 U.S. at 644-647. The Court concluded that the literacy test ban "enables the Puerto Rican minority better to obtain 'perfect equality of civil rights and the equal protection of the laws,' " *id.* at 653, and the Court deferred to Congress's judgment regarding the need for the legislation.[22]

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[21] *See Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 50, 53 (1959).

[22] As the Court reasoned in *Morgan*:

> It was well within congressional authority to say that this need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interests served by the English literacy requirement. It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations – the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the English literacy requirement as applied to residents who have successfully completed the sixth grade in a Puerto Rican school. *It is not for us to review the congressional resolution of these factors. It is enough that we be able to*

Like the Voting Rights Act, the ADA, including the "reasonable accommodation" and "modification" provisions, places people with disabilities in a position where they are better able to obtain their constitutionally guaranteed rights to equal protection. As discussed above, *see supra* p. 21, the ADA creatively discourages the use of culturally-based biases and stereotypes which otherwise lead to unconstitutional discrimination against people with disabilities. This, in turn, results in a greater likelihood that people with disabilities will not be subjected to unconstitutional discrimination. The compelling evidence before Congress of pervasive societal discrimination against people with disabilities provided Congress, similar to the Voting Rights Act, with considerable leeway in adopting this legislative approach to deter and prevent continued disability discrimination.

c. Congress imposed important limitations in the ADA which evidence the congruent and proportional nature of the legislation.

In crafting the ADA, Congress carefully considered the needs of state governments, businesses, etc., and included important limitations in the law. *See City of Boerne*, 521 U.S. at 533 (stating that limiting provisions in legislation "tend to ensure Congress's means are proportionate to ends legitimate under Section 5"). For example, under Title I of the ADA, a "reasonable accommodation"

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perceive a basis upon which the Congress might resolve the conflict as it did.

384 U.S. at 653 (emphasis added).

of a person with a disability is not required if the accommodation would cause an "undue hardship"[23] or if the individual with the disability poses a "direct threat" to the health or safety of other people in the workplace.[24] Under Title II of the ADA, Congress required that a "reasonable modification" be made if it does not "fundamentally alter the nature of the public service, program, or activity."[25] In addition, the ADA does not apply to all individuals with physical or mental impairments, but rather, only to those whose impairments substantially limit their major life activities.[26]

These limitations moderate the effect of the law on the States. They give real balance to the legislation by providing for the proper functioning of state government, but without sacrificing meaningful protection against disability discrimination. *See, e.g., Olmstead v. L.C. ex rel. Zimring*, 119 S. Ct. 2176 (1999).[27] As such, the limitations

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[23] 42 U.S.C. §§ 12111(10), 12112(b)(5)(A) (1994).

[24] 42 U.S.C. §§ 12111(3), 12113(b) (1994).

[25] 42 U.S.C. § 12131(2) (1994); 28 C.F.R. § 35.130(b)(7) (1999).

[26] 42 U.S.C. § 12102(2) (1994). Last term, for example, this Court held that measures that correct for, or mitigate, a physical or mental impairment must be taken into account when judging whether a person is substantially limited in a major life activity and thus covered by the law. *See Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999).

[27] In *Olmstead*, the Court interpreted the "fundamental alteration" provision to give the States considerable latitude to administer their programs for people with mental disabilities. 119 S. Ct. at 2189. As reasoned by the Court:

> Sensibly construed, the fundamental alteration component of the reasonable-modifications regulation would allow the State to show that, in the

in the ADA are a significant part of the law's congruence and proportionality.

In summation, the ADA's uniform, national approach to substantial nationwide discrimination is a proper use of Congress's Fourteenth Amendment authority.[28] The "reasonable accommodation" and "modification" provisions certainly will deter invidious discrimination against people with disabilities, *see supra* pp. 20-22, a permissible use of Congress's Section 5 powers. *See City of Boerne*, 521 U.S. at 518. At the same time, the limits Congress imposed in the ADA mitigate significantly the impact of this remedial legislation on the States. Consequently, the ADA represents a "congruent and proportional" legislative response to an extensively documented and very serious problem, rampant culturally-based discrimination

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> allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities.

Id.

[28] *See Oregon v. Mitchell*, 400 U.S. 112 (1970) which states:

> In imposing a nationwide ban on literacy tests, Congress has recognized a national problem for what it is – a serious national dilemma that touches every corner of our land. In this legislation Congress has recognized that discrimination on account of color and racial origin is not confined to the South, but exists in various parts of the country. Congress has decided that the way to solve the problems of racial discrimination is to deal with nationwide discrimination with nationwide legislation.

Id. at 133-34 (citations omitted).

against members of our society with disabilities.[29] Congress therefore acted well within its Section 5 powers in crafting the ADA.

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[29] The ADA is in stark contrast to the legislation considered by the Court in *City of Boerne* and *Kimel,* where the legislative record contained no evidence of widespread societal discrimination and Congress made no such findings. Also, unlike the Religious Freedom Restoration Act considered in *City of Boerne* and the Age Discrimination Employment Act analyzed in *Kimel,* the ADA's remedial provisions are commensurate with the substantial public concerns identified by Congress's comprehensive review of the culturally-based unequal treatment of people with disabilities.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Eleventh Circuit Court of Appeals and hold that Congress, in enacting the ADA, validly abrogated the States' Eleventh Amendment immunity pursuant to Section 5 of the Fourteenth Amendment.

Respectfully submitted,

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